

N. 2910

No. 14468

**United States
Court of Appeals**
for the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND,
Doing Business as SIEBRAND BROTHERS
CIRCUS AND CARNIVAL,

Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees,

and

S. J. CARROLL,

Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Appellees.

Transcript of Record

**Appeals from the United States District Court for the
District of Arizona**

FILED

DEC 6 1954

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Appeals from the United States District Court for the
District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the
District of Arizona, Phoenix Division

No. 1875

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND and HIKO SIEBRAND, dba
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL, and S. J. CARROLL,

Defendants.

AMENDED COMPLAINT

Plaintiffs complain of defendants and for their
cause of action allege:

I.

Plaintiffs are husband and wife and are residents
and citizens of the State of Iowa. Defendants are
residents and citizens of the State of Arizona.

II.

The matter in controversy exceeds, exclusive of
interest and costs, the sum of \$3,000.00.

III.

On February 20th, 1953, while plaintiffs were
proceeding in their automobile in a northerly direc-
tion on the Tempe Bridge just north of the business
district of Tempe, Arizona, defendants so neglig-
ently, carelessly and wantonly maintained and

operated their motor vehicle and a heavily loaded trailer attached thereto as to cause said trailer to become disconnected and ram into the automobile of plaintiffs with great force and violence.

IV.

As a proximate result of the defendants' aforesaid conduct, plaintiffs were violently thrown about the inside of their automobile [1*] with the following results:

Plaintiff George F. Gossnell received severe, permanent and multiple injuries, including a fracture of the superciliary arch above the left eye; a fracture of two ribs; a compound comminuted fracture of the middle left femur; a linear comminuted fracture of the left knee extending into the joint of the knee; comminuted fracture of the left knee cap; a fracture of the left fibula; and from said injuries plaintiff George F. Gossnell has suffered two spells of embolism in the left lung causing localized pneumonia and has suffered, continues to suffer, and will in the future suffer great pain from said injuries. Plaintiffs further allege that the left leg of plaintiff George F. Gossnell will be rendered stiff and the use thereof permanently impaired.

As a further result of said injuries, plaintiffs have incurred, for the injuries to George F. Gossnell, hospital, doctor and medical expenses in the sum of \$3105.00 to date and will in the future incur expenses for said care in an amount not known to

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

the plaintiffs at this time, all to the plaintiffs' damage in the sum of \$103,105.00.

Plaintiff Estella Gossnell suffered one broken rib and multiple bruises over the entire left side of her body and was hospitalized thereby for a period of one week; said plaintiff was cut on the chin and will be permanently scarred thereby; and, as a further result of said injuries, plaintiffs incurred hospital and medical expenses for said plaintiff Estella Gossnell in the sum of \$205.00, all to plaintiffs' damage in the sum of \$2705.00.

As a further result of the aforesaid negligent conduct of the defendants, plaintiffs' automobile was damaged in the sum of \$1800.00; and plaintiffs have suffered loss of earnings to date in the sum of \$3400.00, and will suffer future loss of said kind in an amount undetermined at this time.

Wherefore, plaintiffs pray for judgment against defendants, and each of them, in the sum of \$111,215.00, for costs herein incurred, and for such other and further relief as the Court deems just.

/s/ DAN CRACCHIOLO,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed September 10, 1953.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant S. J. Carroll, by and through his attorneys, Gibbons and Kinney, and for his answer to the amended complaint of plaintiffs on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I and II of said amended complaint.

II.

Answering the allegations contained in Paragraph III, this answering defendant admits that there was a collision by and between a trailer attached to a vehicle which this defendant was driving, and the automobile of the plaintiffs, but in this connection denies that such collision was caused by the negligent, careless or reckless maintenance and operation of said motor vehicle and trailer on the part of this answering defendant.

III.

Answering the allegations contained in Paragraph IV of plaintiffs' amended complaint, this answering defendant alleges that the damages, if any, sustained by the plaintiffs were the direct and proximate result of their sole negligence, of their contributory negligence, or of their sole and contributory negligence, or of an unavoidable accident. [2]

Further answering said Paragraph IV of plaintiffs' amended complaint, this answering defendant

alleges that he is without sufficient information or knowledge to form a belief as to the nature, character and extent of the allegations therein and therefore denies the same.

Wherefore, this answering defendant prays that the plaintiffs take nothing by their amended complaint and that the same be dismissed; and for such other and further relief as may be proper in the premises.

GIBBONS & KINNEY,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant,
S. J. Carroll.

Receipt of copy acknowledged.

[Endorsed]: Filed September 18, 1953.

[Title of District Court and Cause.]

ANSWER OF P. W. SIEBRAND AND HIKO
SIEBRAND, d.b.a. SIEBRAND BROS. CIR-
CUS AND CARNIVAL, TO PLAINTIFFS'
AMENDED COMPLAINT

Come Now the defendants P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, by their attorney, W. Francis Wilson, and in answer to plaintiffs' complaint admit, deny, and allege as follows:

I.

Admit that plaintiffs are husband and wife and

are residents and citizens of the State of Iowa. Admit that the defendants P. W. Siebrand and Hiko Siebrand are residents of Phoenix, Arizona.

II.

Deny each and every, all and singular, allegation contained in Paragraph II, and specifically deny that the matter in controversy between these answering defendants and the plaintiffs exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000.00) or exceeds the sum of No Dollars or amounts to any sum whatsoever.

III.

Admit that on the 20th day of February, 1953, a trailer came loose from or disconnected from a pickup truck on the Tempe Bridge and ran into the plaintiffs, or the plaintiffs ran into said trailer, and in this connection deny each and every, all and singular, allegation contained in Paragraph III except as herein expressly admitted, and in this connection, these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus [3] and Carnival, deny that any trailer of any kind belonging to them was in any wise involved in any accident with the plaintiffs, and deny that the trailer that was involved in the accident was heavily loaded or loaded at all, and in this connection, these answering defendants P. W. Siebrand and Hiko Siebrand allege that the trailer which collided with the plaintiffs or with which the plaintiffs collided, was a tandem-wheeled, aluminum-bodied trailer, which was com-

pletely empty. These answering defendants, P. W. Siebrand and Hiko Siebrand, further deny that at said time and place or elsewhere they or any of their employees or anyone with their consent was operating a truck for them or on their behalf or with their consent in a negligent, careless or reckless manner or in anywise so as to cause any damage of any kind to the plaintiffs, and in this connection, these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, allege that there was a truck upon said Tempe Bridge which to the best knowledge of these answering defendants had been pulling an aluminum-bodied, empty trailer, which said trailer was the property of William Siebrand and in no wise the property of these answering defendants, P. W. Siebrand and Hiko Siebrand, or Siebrand Brothers Circus and Carnival, and in nowise was being used or transported at their instance and request or for their benefit or for or with their consent, and in this connection, these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, allege that a pickup truck that was their property was upon said Tempe Bridge at said time and place, and had been pulling said trailer and that said truck was at that time driven and operated without the consent of P. W. Siebrand, Hiko Siebrand, or their agent or agents or any agent or agents of Siebrand Brothers Circus and Carnival, nor was said truck at said time and place being operated on any mission or on any joint

venture or in anywise being operated for and on behalf of these answering defendants or Siebrand Brothers Circus and Carnival.

IV.

These answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, deny each and every, all and singular allegation contained in Paragraph IV of plaintiffs' complaint, except as hereinafter expressly admitted, and in this connection these answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, admit that as a result of said trailer colliding with the plaintiffs or the plaintiffs colliding with the trailer, the plaintiffs received injuries, the exact nature of which and the exact extent of which the answering defendants do not know, and therefore deny except to admit that the plaintiff, Estella Gossnell, received minor injuries, and the plaintiff, George F. Gossnell, received injuries of a more serious nature, and in this connection, defendants, P. W. Siebrand and Hiko Siebrand, allege that none of said injuries was the direct or proximate result of any action whether negligent, careless or reckless on the part of P. W. Siebrand or Hiko Siebrand or any agent of theirs, nor were said injuries to the plaintiffs the direct or proximate result of a collision with any motor vehicle or trailer belonging to P. W. Siebrand, Hiko Siebrand or Siebrand Brothers Circus and Carnival, nor were said injuries to the plaintiffs caused by the negligence in the operation of any motor vehicle being driven

with the consent of these answering defendants, nor were said injuries the proximate result of any motor vehicle being driven in a careless, negligent or reckless manner by an employee of these answering defendants, nor were said injuries the proximate result of any motor vehicle being driven in a careless, reckless or negligent manner by any agent or person engaged in a joint venture or other venture on behalf of these answering defendants. These answering defendants admit that the automobile of the plaintiffs herein was badly damaged as a result of their colliding with a trailer upon the Tempe Bridge, and deny all responsibility by way of negligence or otherwise for said damage to said automobile.

These answering defendants, P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Circus and Carnival, deny each and every, all and singular, allegation contained in this complaint except as herein expressed and admitted, and having fully answered, pray that plaintiffs take nothing by their complaint against these answering defendants and that they go hence with their costs, and for such other and further relief as to the Court may seem just in the premises.

/s/ W. FRANCIS WILSON,
Attorney for P. W. Siebrand and Hiko Siebrand,
d.b.a. Siebrand Brothers Circus and Carnival.

Affidavit of Mailing attached.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY—TUESDAY, APRIL 13, 1954

This case comes on regularly for trial this date. The plaintiffs are present with their counsel, William P. Mahoney, Esquire, and Joseph Raineri, Esquire. Defendant P. W. Siebrand is present with his counsel, Francis Wilson, Esquire, and defendant S. J. Carroll is present with his counsel, Howard Gibbons, Esquire.

Both sides announce ready for trial.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case be excused until Thursday, April 15, 1954, at 10:00 o'clock a.m.

Counsel for plaintiffs now states plaintiffs' case to the jury and counsel for respective defendants state defendants' case to the jury.

Plaintiffs' Case

George F. Gossnell is sworn and examined in his own behalf.

And thereupon, at 11:50 o'clock a.m., It Is Ordered that the further trial of this case be continued until two o'clock p.m.

Subsequently, at two o'clock p.m., the jury, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case (Continued)

Estella Gosnell is now sworn and examined on behalf of plaintiffs.

The following plaintiffs' exhibits are now admitted in evidence:

1. Envelope containing receipts.
2. Business card.
3. Appraisers reports on automobile.

P. W. Siebrand is now sworn and cross-examined as an adverse party.

Deposition of Fred Clark is admitted and read in evidence, as Plaintiffs' Exhibit 4.

John Boyd is now sworn and examined on behalf of plaintiffs.

Dr. Ernest E. Pohle is sworn and examined on behalf of plaintiffs.

Plaintiffs' Exhibit 6, X-rays, is now admitted in evidence.

Plaintiffs' Exhibit 7, X-rays, is now admitted in evidence.

And thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued until Wednesday, April 14, 1954, at 11:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
APRIL 14, 1954

The jury, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Plaintiffs' Case (Continued)

Dr. Stanford F. Hartman is sworn and examined on behalf of the plaintiffs.

Plaintiffs' Exhibit 8, X-rays, is now admitted in evidence.

Donald E. Deuel is now sworn and examined on behalf of plaintiffs.

The following plaintiffs' exhibits are admitted in evidence:

10. Photograph.
11. Photograph.
12. Photograph.
13. Photograph.

Mortality table showing life expectancy of plaintiff George F. Gossnell is admitted and read in evidence.

And thereupon the plaintiffs rest.

At 11:45 o'clock a.m. the jury is admonished by the Court and excused until two o'clock p.m.

Counsel for defendants move for directed verdicts.

It is Ordered that said motions for directed verdict be and they are denied.

At 11:50 o'clock a.m., it is Ordered that the further trial of this case be continued until two o'clock p.m.

Subsequently, at two o'clock p.m., the jury, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendants' Case

Dr. W. A. Bishop, Jr., is sworn and examined for defendants.

S. J. Carroll is now sworn and examined for defendants.

Defendants' Exhibit A, X-rays, is now admitted in evidence.

Defendants' Exhibit D, trailer hitch, is now admitted in evidence.

Owen Kelly is sworn and examined on behalf of the defendants.

Defendants' Exhibit F, invoice, is admitted in evidence.

William Siebrand is now sworn and examined on behalf of defendants.

Defendants' Exhibit G, Title, is admitted in evidence.

The following defendants' witnesses are now sworn and examined:

Joseph Steinberg,

Hiko Siebrand,

Ralph Horsman,

Cora Ritter,

Peter H. Siebrand.

And thereupon, at 4:55 o'clock p.m., It Is Ordered that the further trial of this case be continued until Thursday, April 15, 1954, at 10:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
APRIL 15, 1954

The jury, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendants' Case (Continued)

P. W. Siebrand is called and examined in his own behalf.

And thereupon defendants Siebrand rest.

It Is Ordered that the record show the defendant, S. J. Carroll, adopts testimony of witnesses, William Siebrand, Owen Kelly and S. J. Carroll.

And defendant S. J. Carroll rests.

Both sides rest.

Counsel for defendants S. J. Carroll and Hiko Siebrand move that deposition of Fred Clark be stricken.

It Is Ordered that said motion be denied.

And thereupon at 11:45 o'clock a.m., It Is Ordered that the further trial of this case be continued until 1:30 o'clock p.m.

Subsequently, at 1:30 o'clock p.m., the jury, the parties and counsel being present pursuant to recess further proceedings of trial are had as follows:

Whereupon, the case is argued by respective counsel to the jury.

And thereupon, at 4:00 o'clock p.m., It Is Ordered that the further trial of this case be continued until Friday, April 16, 1954, at 9:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
APRIL 16, 1954

The jury, the parties and counsel are present pursuant to recess, and further proceedings of trial are had as follows:

The court duly instructs the jury and the jury retire at 9:55 o'clock a.m. in charge of sworn bailiff to consider their verdicts.

Subsequently, at 12:00 o'clock noon, it is ordered that the marshal provide meals for the jury and their bailiffs during the deliberation of this case at the expense of the United States.

At the hour of 1:50 o'clock p.m., counsel for respective parties being present, the jury return into

open court and are asked if they have agreed upon a verdict. Whereupon the Foreman reports that they have agreed and presents the following verdicts, to wit:

Civ-1875, Phx.

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

Against

P. W. SIEBRAND and HIKO SIEBRAND,
d/b/a SIEBRAND BROTHERS CIRCUS
AND CARNIVAL, and S. J. CARROLL,

Defendants.

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendants P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Brothers Circus and Carnival, and assess their damages at \$95,000.00.

A. H. DIXON,
Foreman.

Civ-1875, Phx.

GEORGE GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

Against

P. W. SIEBRAND and HIKO SIEBRAND, d/b/a
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL, and S. J. CARROLL,

Defendants.

VERDICT

We, the Jury, duly empaneled and sworn in the
above-entitled action, upon our oaths, do find for
the plaintiffs against defendant S. J. Carroll, and
assess their damages at \$100.00.

A. H. DIXON,
Foreman.

The verdicts are read as recorded and no poll
being desired by either side, the jury is discharged
from the further consideration of this case and ex-
cused until further order.

On motion of counsel for plaintiff,

It Is Ordered that judgment on the verdicts be
entered by the Clerk.

On motion of Francis Wilson, Esquire, counsel
for defendants Siebrand,

It Is Ordered that the execution of judgment be
stayed for a period of thirty days.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendants P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Brothers Circus and Carnival, and assess their damages at \$95,000.00.

/s/ A. H. DIXON,
Foreman.

[Endorsed]: Filed April 16, 1954. [5]

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendant S. J. Carroll, and assess their damages at \$100.00.

/s/ A. H. DIXON,
Foreman.

[Endorsed]: Filed April 16, 1954. [6]

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY
PLAINTIFFS

The plaintiffs above named respectfully request the Court to give to the jury the instructions hereto annexed.

WILLIAM P. MAHONEY, JR.,
J. C. RAINERI,
Attorneys for Plaintiffs. [7]

Plaintiffs' Requested Instruction No. 1

The Arizona Code, 1952 Cum. Supp., Sec. 66-183, provides as follows:

“No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this act and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway.”

Given.

DAVE W. LING,
Judge.

[Pencilled in margin]: Give No. 7.

Plaintiffs' Requested Instruction No. 2

You are instructed that if you find from a preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand, and William Siebrand intended and did join their efforts in furtherance of the Circus and Carnival Show to be shown at the Maricopa County Fair at Mesa for their joint profit then you may find that they were joint adventurers and were jointly and severally liable for the negligent conduct of the defendant S. J. Carroll. I further instruct you that, if you find from a preponderance of the evidence in this case, that such negligence was the proximate cause of the injuries and damages sustained by plaintiffs George F. Gossnell and Estella Gossnell, or proximately contributed to cause same then they may recover from the defendants and your verdict would be for the plaintiffs.

Hoge v. George,
(Wyo.) 200 Pac. 96, 18 A.L.R. 469;

Di Vita v. Martinelli,
(Cal.) 11 Pac. (2) 423;

Hupfeld v. Wadley,
(Cal.) 200 Pac. (2) 564.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 3

You are instructed that joint adventurers are liable to third persons as partners for wrongful acts committed in conducting the joint enterprise, and each joint adventurer may be liable for the negligence of his associate or of any agent, servant, or employee of his associate joint adventurer, if the negligent act or conduct is within the scope of the joint undertaking. You are further instructed that with respect to a joint adventure involving the control and operation of a motor vehicle, all joint adventurers are liable for personal injuries suffered by others from the negligent operation of said motor vehicle including instances in which the actual negligence is that of agents and employees of the joint adventurers acting within the scope of the joint undertaking.

Mann v. Commonwealth Bond Corp.,
27 Fed. Supp. 315;

Poutre v. Saunders,
19 Wash. 2d, 561, 143 Pac. (2) 554.

Withdrawn.

Plaintiffs' Requested Instruction No. 4

You are instructed that to constitute a joint adventure, the parties must combine their property, money, efforts, skill, and knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same charac-

ter, but there must be some contribution by each co-adventurer of something promotive of the enterprise, and it is immaterial whether the property involved was individually owned before the joint venture was entered upon, so long as it was contributed and devoted to the uses and purposes of the enterprise.

30 Am. Jur. Par. 10, pages 681, 682;

Simpson v. Richmond Worsted Spinning Co.,
128 Me. 22, 145 A. 250. 63 A L R 910.

Withdrawn.

Plaintiffs' Requested Instruction No. 5

You are instructed that if you find from a preponderance of the evidence that the act of the defendant S. J. Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise in which P. W. Siebrand, Hiko Siebrand, and William Siebrand were interested then and in such event, you are instructed that P. W. Siebrand, Hiko Siebrand, and William Siebrand were joint adventurers.

You are further instructed that it is immaterial that the particular journey is a single transaction; or that the truck and trailer were owned by P. W. Siebrand, Hiko Siebrand or by William Siebrand or by all of them jointly; the use of the truck and trailer as a part of a common business enterprise

makes each of them responsible for the manner in which it was operated.

Restatement of Law of Torts,
Par 491 (e), Page 1275.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 6

You are instructed that if the purpose of the journey from Phoenix to Mesa by the defendant S. J. Carroll was for the benefit of the owners of the truck and trailer, and for their joint benefit, and as a part of a common business enterprise, the owners may, under the principles of the law of agency, be regarded as the masters of the driver S. J. Carroll even though no wages or reward were paid to him.

Restatement of Law of Torts,
Par. 492, Page 1278.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 7

You are instructed that as between the parties themselves, the relationship of joint adventurers is a matter of intent, and arises when they intend to

associate themselves as such, there need be no formal agreement particularly specifying or defining the rights and duties of the parties. Such an agreement may be inferred from the conduct of the parties or from facts and circumstances which make it appear that a joint enterprise was in fact entered into. The consideration for a contract of joint adventure may be a promise, express or implied to contribute capital or labor to the enterprise.

30 Am. Jur. Sec. 9, p. 681,
138 A L R 969.

Given.

DAVE W. LING,
Judge.

[Pencilled in margin]: Given as No. 2.

Plaintiffs' Requested Instruction No. 8

You are instructed that a duty rests upon every man, in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured he shall answer for the damage.

You are further instructed that the rule of imputed negligence stemming from a joint enterprise, rests upon the relationship of agency existing among persons engaged in a joint or common enterprise, and that the theory upon which the doctrine of joint enterprise rests is that the associates in the

enterprise are partners or that each is an agent for the other.

Thompson v. Bell,
129 Fed. (2) 211;

Poutre v. Saunders,
(Wash.) 143 Pac. 2d. 554.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 9

You are instructed that since joint adventurers are jointly liable the persons who are damaged have their election to sue all of said joint adventurers or to sue one or more of them, and may even single out for suit a joint adventurer who personally was in no wise involved in the commission of the negligent act.

40 Am. Jur. Par. 190.

Withdrawn.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 10

You are instructed that with regard to the degree of proof all that is required in negligence cases is

for the plaintiff to present probative facts from which negligence and the causal relation may be reasonably inferred.

Nichols v. City of Phoenix,
68 Ariz. 124, 202 P. 2d 201.

Withdrawn.

Plaintiffs' Requested Instruction No. 11

You are instructed that we have under the law of this State a rule of evidence known as *res ipsa loquitur*, and you are instructed that under and by virtue of this rule that where the thing which caused the injury complained of (in the instant case the truck and trailer driven by the defendant S. J. Carroll) is shown to be under the management of the defendants or their servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of care. In other words, you are instructed, when such circumstances are shown to exist, the inference arises that defendants are guilty of negligence, and, in the absence of explanation by defendants, justifies a recovery in damages by plaintiffs for such wrong, provided, that you have found there was a common business

enterprise existing among P. W. Siebrand, Hiko Siebrand and William R. Siebrand.

Tiller v. Von Pohle,
72 Ariz. 11, 230 P. 2d 213.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 12

You are instructed that under the law of this state proof of ownership is prima facie evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner and is using the vehicle in the business of the owner; and you are further instructed that it is not essential that the agency presumed from proof of such ownership should be a business agency, or the service a remunerative service.

Baker v. Maseeh,
20 Ariz. 201, 179 Pac 53;

Lutfy v. Lockhart,
37 Ariz. 488, 295 Pac. 53.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 13

You are instructed that if you should find from a preponderance of the evidence that the defendants were guilty of negligence, and that their negligence

was the proximate cause of the injuries complained of, then it will be your duty to go further and assess the damages in this case and give to the plaintiff George F. Gosnell what will reasonably compensate him as disclosed by the evidence for the injuries sustained; and in arriving at that you will take into consideration the character of the injuries sustained by plaintiff, the pain and suffering which he endured as a result thereof, if any, and the pain and suffering which he in all probability may endure in the future, if any, taking into consideration his age and life expectancy.

Coppinger v. Broderick,

37 Ariz. 473, 295 Pac. 780.

Withdrawn.

Plaintiffs' Requested Instruction No. 14

You are instructed that if you should find that no circumstances existed which impaired the testimony of a witness to a particular fact, you should take such testimony as establishing the fact, and the testimony of that witness should not be disregarded.

Phoenix Blue Diamond Exp. v. Mendez,

103 Fed. 2d 66, 308 U. S. 566, 84 L. Ed. 475.

Refused.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 15

You are instructed that it is the rule of law in this state that you jurors as triers of fact in this case may disregard the unimpeached and undiscredited testimony of a party to a case on the ground that his personal interest in the result may lead him to testify contrary to the true facts of the case.

Row v. Goldberg, Inc.,

50 Ariz. 349, 72 Pac. 2d 432;

Silva v. Traver,

63 Ariz. 364, 162 Pac. 2d 615;

Clint v. Northern Assur. Co.,

71 Ariz. 44, 223 Pac. 2d 401.

Refused.

DAVE W. LING,

Judge.

Plaintiffs' Requested Instruction No. 16

If from the evidence you should find that at the time of the accident in question the truck then being driven by S. J. Carroll was owned by the defendants, P. W. and/or Hiko Siebrand, and that said Carroll then was an employee of said owner, or owners, you may infer from such evidence that the said S. J. Carroll then was acting as the agent of said owner and within the scope of his authority and was operating the automobile with the permission of the owner. You are not compelled to draw that inference if against your reason, but you may do so if your reason and discretion so dictate; and if you draw such an inference you are not required

to abandon it in the face of uncontradictory evidence but must weigh the inference and such evidence as favors it against all contrary evidence, thus to determine which, if either, preponderates.

Caljic, No. 54-E.

Refused.

Withdrawn.

Plaintiffs' Requested Instruction No. 17

Now upon the question of damages the question arises as to what effect the second injury that he received will have upon the damages. The law is this: If a person is injured, as the plaintiff, George F. Gossnell, was, and proceeds in accordance with the instructions of the doctors and in a careful manner, that is, a reasonably careful manner in getting about, and another accident happens to him which results in aggravating his injury, without negligence on his part then the added injury may be added to the original injury, and the damages may be compensation for all of the injury. If, on the other hand, the second injury was the result of the negligence of the plaintiff, disobedience of the instructions of his physicians, or lack of care on the part of the plaintiff, then the defendant may not be charged with the added injury so received.

Wagner v. Mittendorf,

232 N. Y. 481, 134 N. E. 539, 20 A. L. R.

520.

Refused.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 18

You are instructed that if you should find, from a preponderance of the evidence, that the defendants were guilty of negligence, and that this negligence was the proximate cause of the injury and damage complained of, then it will be your duty to go further and assess the damages in this case and give to plaintiffs what will reasonably compensate them as disclosed by the evidence for the injuries and damages sustained; and in arriving at that you will take into consideration the permanent injuries sustained, loss of wages, impaired earning capacity, pain and suffering, physicians', nurses' bills and hospital expenditures, if any, and the pain and suffering, medical expense which plaintiffs in all probability, and to a reasonable certainty, may endure in the future, if any, taking into consideration age and life expectancy.

Coppinger v. Broderick,

37 Ariz. 473, 295 Pac. 780;

City of Bisbee v. Thomas,

24 Ariz. 614, 212 Pac. 190;

S. A. Gerrard Co. v. Couch,

43 Ariz. 57, 29 Pac. 2d 151;

White v. Breedon,

65 Ariz. 117, 175 Pac. 2d 201;

Sim v. Weeks,

7 Cal. App. (2) 28, 45 Pac. 2d 350.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 20

You are instructed that the creation of an agency relationship arises from the consent of the parties. It is not essential that any actual contract should exist or that compensation should be expected by the agent; and the assent of the parties thereto may be either express or implied. An implied agency is an actual agency; it is a fact which is to be proved by deductions or inferences from other facts and circumstances.

If relations exist which will constitute an agency, it will be an agency whether the parties understood the exact nature of the relation or not.

2 Am. Jur. Par. 23, Page 25 and Par. 24,
Page 26.

Given.

DAVE W. LING,
Judge.

Plaintiffs' Requested Instruction No. 21

You are instructed that when a person has suffered injury from the negligent management of a vehicle, it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the vehicle without proving affirmatively that the person in charge was the defendant's servant or agent. It lies with the defendant to show that the person in charge was not his servant or agent, leaving him to show, if he can,

that the vehicle was not under his control at the time and that the accident was occasioned by the fault of a person for whose negligence the owner is not answerable. The burden of proof is cast on the owner to show, if he can, that the negligent driver was not his servant or agent.

Baker v. Maseeh,

20 Ariz. 201, 179 Pac. 53.

Given.

DAVE W. LING,
Judge.

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

Defendants Siebrands' Requested Instruction No. 1

You are instructed that if you find from a preponderance of the evidence in this case, that the truck which was pulling the trailer at the time of the accident, was being driven without the consent of the owners, then you must find for the defendants Siebrands and return your verdict accordingly.

Given. [8]

Defendants Siebrands' Requested Instruction No. 2

You are instructed that a joint adventure is an association of persons to carry out a single business enterprise for a profit for which purpose they combine their property, money, efforts, skill and knowl-

edge. Each participant therein is agent for each of the others and it is essential that each have control of the means employed to carry out the common purpose.

To constitute a joint adventure there must be more than the mere fact of a share in the profits of the business. One of the most important tests of a joint adventure is whether there is a share in the losses.

Refused.

110 Federal 2nd 135, Troietto vs. G. H. Hammond Company;

Telling Belle Vernon Company vs. Krenz,
34 Ohio Appellate 499, 171 Northeastern
357;

Dumas vs. O'Leary,
277 Pac. 447, 152 Washington 205;

Estrella vs. Suarez,
134 Pac. 2nd 170, 60 Arizona 187.

Defendants Siebrands' Requested Instruction No. 3

You are instructed that parties cannot be said to be engaged in a joint enterprise within the meaning of the law of negligence unless there is a community of interest in the undertaking and an equal right to govern and direct the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management. In other words, in this case, in order to find that a joint adventure existed between Wil-

liam R. Siebrand, the owner of the trailer involved in the accident, and P. W. Siebrand and Hiko Siebrand, the owners of Siebrand Brothers Circus and Carnival, you must find that William R. Siebrand had a voice and a right to be heard in the control and management of the circus and carnival and that the Siebrand Brothers had a voice and right to be heard in the control and management of the bird store, operated as a concession by Carroll for William R. Siebrand.

You are further instructed that in order to find that a joint adventure existed between the parties, last named, you must find that they had an agreement, express or implied, to share the profits and losses of the business and not an agreement for the payment of rent by William R. Siebrand to P. W. Siebrand and Hiko Siebrand, the owners of Siebrand Brothers Circus and Carnival, and you must further find that there was such an intent of each of the parties thereto to become joint adventurers and to exercise joint proprietorship and joint control of the circus and carnival and all the concessions so owned by the said William R. Siebrand.

· Refused.

30 Am. Jur. 682, paragraphs 11 and 12,
Troietto vs. G. H. Hammond Company;

110 Federal 2nd 135, Callahan vs. Harm, 98
Cal. Appellate 568, 277, Pac. 529;

Soulek vs. Omaha,

1941 Nebraska 299, Northwestern 368.

Defendants Siebrands' Requested Instruction No. 4

You are instructed that a mere rental agreement for the rental of space does not create a joint adventure even though the consideration for the rental is based upon percentage of the gross sales.

Should you find that William R. Siebrand, in the operation of his bird store concession, was merely renting space from P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and that the consideration for the rental of space was based upon a percentage of the sales made during the operation of the concession, then you must find that no joint adventure was created.

Refused.

Dumas vs. O'Leary,

152 Washington 205, 277 Pac. 447.

Defendants Siebrands' Requested Instruction No. 5

You are instructed that an independent contractor is one who carries on an independent employment in pursuance of an agreement by which he has entire control of the work and the manner of its performance, as one who contracts to do a specific piece of work, furnishing his own assistance and executing the work in accordance with either directly, his own ideas, or a plan previously given to him by the person for whom the work is done without being

subject to the orders of the latter with respect to the details of the work.

You are further instructed that should you find that S. J. Carroll was an independent contractor and not an agent of William R. Siebrand in the operation of the bird store concession, then you must return a verdict for the defendants, P. W. Siebrand, Hiko Siebrand and Siebrand Brothers Circus and Carnival.

Given.

27 Am. Jur., page 482, A.L.R. T28;

Moody vs. Industrial Accident Commission,
204 Cal. 668, 269, page 542.

Defendants Siebrands' Requested Instruction No. 6

You are instructed that William R. Siebrand was the owner of the trailer involved in the accident and that the name Siebrand Brothers Circus and Carnival painted on the trailer does not of itself affect the ownership of William R. Siebrand, in said trailer.

Given.

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

DEFENDANT S. J. CARROLL'S REQUESTED
INSTRUCTION No. I

You are instructed that upon plaintiffs rest the burden of showing by a preponderance of the evidence that it was the negligence of the defendant which caused the injury. Unless plaintiffs make this proof they cannot recover. A mere surmise that there may have been negligence on the part of the defendant S. J. Carroll, or the mere fact that an accident happened to the plaintiffs, does not entitle the plaintiffs to a verdict.

Armstrong v. Day,

103 Cal. App. 465, 284 Pac. 1083.

Given. [9]

[Title of District Court and Cause.]

DEFENDANT S. J. CARROLL'S REQUESTED
INSTRUCTION No. II

You are instructed that the mere fault that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was possible for such an accident to be avoided. They simply denote an accident that occurred without

having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Merry v. Knudsen Creamery Co.,
Cal. App., 211 Pac. 2d 905.

Given.

[Title of District Court and Cause.]

DEFENDANT S. J. CARROLL'S REQUESTED
INSTRUCTION No. III

You are instructed that the driver of an automobile or truck is not the insurer of the safety of others, and in case they exercise that degree of care for the safety of others which is prescribed by the statute and such as ordinarily prudent persons usually use under the same or similiar circumstances, then they have discharged their duty and are not lacking in ordinary care.

Thiel v. Juelling, Circuit Court, Marathon
County, Wisconsin.

Given.

[Endorsed]: Filed April 16, 1954.

In the United States District Court
for the District of Arizona

Phoenix Civil Docket Civ-1875 PHX

Title of Case

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND, HIKO SIEBRAND d.b.a.
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL and S. J. CARROLL,

Defendants.

ENTRY OF JUDGMENTS

Filings-Proceedings

Apr. 16, 1954; 5:30 p.m.

Judgment entered on the verdict in favor of plaintiffs George F. Gossnell and Estella Gossnell against defendants P. W. Siebrand & Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, in the sum of \$95,000.00.

Apr. 16, 1954; 5:30 p.m.

Judgment entered on the verdict in favor of plaintiffs George F. Gossnell and Estella Gossnell against defendant S. J. Carroll, in the sum of \$100.00. [13]

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF
JUDGMENT

Come now the defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and move the Court to strike from the verdict against the above-named defendants all damages in excess of the sum of One Hundred Dollars (\$100.00) for the reason that any damages in excess of the amount of One Hundred Dollars (\$100.00) is surplusage and improper.

/s/ W. FRANCIS WILSON,
Attorney for the Siebrands.

Authority:

Pinnix vs. Griffin 221 North Carolina 348
20 Southeastern 2nd 366.

Notice

To: William P. Mahoney, Jr., and J. C. Raineri,
Attorneys for Plaintiffs:

You and each of you will please take notice that the foregoing motion is set down for arguing on the 10th day of May, 1954, at 10:00 o'clock a.m., before the above-entitled court.

W. FRANCIS WILSON, and
KENT A. BLAKE,

By /s/ W. FRANCIS WILSON,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed April 26, 1954. [15]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and move the Court that the verdict of the jury, in the above-entitled cause, be set aside as to the defendants Siebrand and that the judgment entered on the verdict be vacated and set aside as to the defendants Siebrand, and that a new trial be granted to the defendants Siebrand for the following reasons:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. There is no evidence that the defendants, P. W. Siebrand and Hiko Siebrand are guilty of negligence.
4. The Court erred in denying the above-named defendants' motion to direct a verdict in their favor at the close of the plaintiffs' case.
5. There is not sufficient or substantial evidence tending to support the amount of the jury's verdict.
6. The verdict is excessive and appears to have been given under the influence of passion and prejudice.
7. The Court erred in giving to the jury plaintiffs' requested instructions Nos. 2, 5, 6, 7, 8, 11, 12, 18, 20 and 21, over the defendants' objection.

8. The Court erred in failing to give defendants' requested instructions Nos. 2, 3, and 4, concerning joint adventure.

9. The verdict was founded upon surmise, conjecture, speculation, and inference. [16]

10. The Court erred in admitting irrelevant, incompetent, and prejudicial testimony offered by the plaintiff over defendants' objection.

11. The Court erred in failing to instruct the jury that statements made several days after the accident, by P. W. Siebrand, alleged to constitute admissions of liability were not applicable to Hiko Siebrand nor defendant Carroll.

12. The Court erred in allowing evidence of future medication and hospitalization in that there was no evidence that the defendant, George Gossnell, was not healed at the time of trial inasmuch as no examination had been made of him by any doctor since March 1, 1954, except by Dr. Bishop, who testified that Gossnell was well at the time of trial.

Dated this 26th day of April, 1954.

/s/ W. FRANCIS WILSON,

Attorney for Defendants P. W. Siebrand and Hiko Siebrand.

Authorities in support of Motion:

Rule 59 of Federal Practice and Procedure.

Notice

To: William P. Mahoney, Jr., and J. C. Raineri.
Attorneys for Plaintiffs:

You and each of you will please take notice that the foregoing motion is set down for arguing on the 10th day of May, 1954, at 10:00 o'clock a.m., before the above-entitled court.

W. FRANCIS WILSON, and
KENT A. BLAKE,

By /s/ W. FRANCIS WILSON,
Attorneys for Defendants.

Affidavit of mail attached.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

MOTION FOR SATISFACTION OF
JUDGMENT

Comes Now the defendant S. J. Carroll in the above-entitled and numbered cause, by his attorneys, Gibbons, Kinney & Tipton, and respectfully moves the Court that satisfaction be entered of record of the judgment heretofore rendered and entered in the above-entitled and numbered cause on or about the 16th day of April, 1954, in favor of the plaintiffs and against the said defendant S. J. Carroll, and represents to the Court that the defendant S. J. Carroll has heretofore tendered to the plaintiffs the amount of said judgment which was refused and has presently tendered said amount to the Clerk

of the above-entitled Court; and that this motion is based upon the records, files and proceedings in said cause.

Dated this 29th day of April, 1954.

GIBBONS, KINNEY &
TIPTON,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant. [17]

Notice of Motion

To: George F. Gossnell and Estella Gossnell, his wife, Plaintiffs, and Wm. P. Mahoney, Jr., and J. C. Raineri, Attorneys for Plaintiffs; P. W. Siebrand, Hiko Siebrand d.b.a. Siebrand Brothers Circus and Carnival, Defendants, and W. Francis Wilson, Attorney for Said Defendants:

You, and Each of You, will please take notice that the above motion will be presented to the Court at the next regular call of the motion calendar, or as soon thereafter as the same may be heard.

GIBBONS, KINNEY &
TIPTON,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant
S. J. Carroll.

Affidavit of mail attached.

[Endorsed]: Filed April 29, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY—MAY 17, 1954

Motion to Strike Portion of Judgment and Motion for New Trial, of Defendants P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival; and Motion for Satisfaction of Judgment, of defendant S. J. Carroll, come on regularly for hearing this day.

Wm. P. Mahoney, Esq., and Joseph Raineri, Esq., appear for the plaintiffs. Francis Wilson, Esq., and Howard Gibbons, Esq., appear for the respective defendants.

Said motions are argued by respective counsel.

It Is Ordered that said Motion to Strike Portion of Judgment, and Motion for New Trial, of Defendants P. W. Siebrand and Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, be and they are denied.

It Is Ordered that said Motion for Satisfaction of Judgment, of Defendant S. J. Carroll, be and it is denied.

Francis Wilson, Esq., now moves for further stay of execution of judgment on behalf of defendants Siebrand.

It Is Ordered that the execution of judgment be stayed for a period of thirty days from this date.

(Docketed May 17, 1954.) [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

(Carroll)

Notice is hereby given that S. J. Carroll hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order denying defendant Carroll's motion for satisfaction of judgment made and entered in the minutes of said Court on the 17th day of May, 1954.

Dated this 16th day of June, 1954.

GIBBONS, KINNEY &
TIPTON,

By /s/ HOWARD W. GIBBONS,
Attorneys for Defendant,
S. J. Carroll.

[Endorsed]: Filed June 16, 1954. [19]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

I, the undersigned, have deposited with the Clerk of the Court the sum of Two Hundred and Fifty Dollars (\$250.00) as cash bond for the cost bond on appeal in the above-entitled matter.

The condition of this bond is that whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed June 16, 1954, from the order of this Court, denying satisfaction of judgment, entered May 17, 1954, if

the defendant shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ S. J. CARROLL.

[Endorsed]: Filed June 16, 1954. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL (Siebrand)

Notice is hereby given that P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of April, 1954, in favor of the plaintiffs in said action and against defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and from the whole thereof, from the order denying defendants' motion for a new trial made and entered in the minutes of said Court on the 17th day of May, 1954, from the order denying defendants' motion to strike a portion of the judgment made and entered in the minutes of said Court on the 17th day of May, 1954, and from the order denying defendant Carroll's motion for satisfaction of judgment made and entered in the

minutes of said Court on the 17th day of May, 1954.

Dated this 14th day of June, 1954.

/s/ W. FRANCIS WILSON,
Attorney for Defendants P. W. Siebrand and Hiko
Siebrand.

[Endorsed]: Filed June 14, 1954. [23]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, have deposited with the Clerk of the Court the sum of Two Hundred Fifty Dollars (\$250.00) as cash bond for the cost bond on appeal in the above-entitled matter.

The condition of this bond is that whereas the defendants have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed June 10, 1954, from the judgment of this Court entered April 16, 1954, if the defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

/s/ P. W. SIEBRAND,

/s/ HIKO SIEBRAND.

[Endorsed]: Filed June 14, 1954. [24]

In the United States District Court,
District of Arizona
No. Civil 1875

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND, HIKO SIEBRAND, d.b.a
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL and S. J. CARROLL,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Proceedings had and evidence taken in the above-entitled cause before the Honorable Dave W. Ling, Judge of said court, and a jury, in the courtroom of the United States Courthouse, at Phoenix, Arizona, commencing on the 13th day of April, A.D. 1954, at ten o'clock a.m.

Present:

MR. WILLIAM P. MAHONEY, JR.,

MR. J. C. RAINERI,

Appeared for Plaintiffs.

MR. W. FRANCIS WILSON,

Appeared for Defendants P. W. Siebrand
and Hiko Siebrand.

GIBBONS, KINNEY & TIPTON, by

MR. HOWARD W. GIBBONS,

Appeared for Defendant S. J. Carroll.

The Clerk: Case Number Civil 1875 Phoenix, George F. Gossnell, et ux., versus P. W. Siebrand, et al., for trial.

The Court: Are you ready, gentlemen?

Mr. Raineri: Plaintiff is ready.

Mr. Wilson: Defendant is ready.

The Court: Call the names of eighteen jurors. As your names are called, come forward.

(Whereupon 12 jurors were selected and sworn to try the issues.)

The Court: You may make your opening statements.

(Whereupon Opening Statements were made to the Jury by Mr. Raineri, Mr. Wilson, and Mr. Gibbons.)

The Court: We will have our morning recess at this time. During the recess you are not to discuss the case among yourselves, or with anyone else. Also avoid forming or expressing an opinion on any subject connected with this case. The Court will stand at recess for five minutes.

(A recess was had.)

The Court: Call your first witness.

(The following testimony was introduced on behalf of the Plaintiffs.) [2*]

Mr. Raineri: We call Mr. Gossnell, your Honor.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

GEORGE F. GOSSNELL

plaintiff herein, called as a witness, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Will you please state your full name?

A. George F. Gossnell.

Q. Where do you live, Mr. Gossnell?

A. Fort Dodge, Iowa.

Q. And how old are you? A. I am 65.

Q. Now, directing your attention to the 20th day of February, 1953, that is approximately a year ago this last February, or fourteen months ago at this time, approximately, will you tell us where you started out from in the early morning of that day, and at about what time?

A. Well, we left Tucson, Arizona, about 7:30 in the morning, on our way to visit my daughter in California. She was in Ontario.

Q. Ontario?

A. Ontario, California. We were going by way of Phoenix before we went home to Fort Dodge.

Q. In other words, then, on your way from [3] Tucson to Ontario, California, it was necessary for you to come through Phoenix, is that right?

A. I don't know as it was absolutely necessary, but that was the route we had planned. We had never seen Phoenix, and we wanted to go through Phoenix and see the city.

Q. Now, directing your attention to approxi-

(Testimony of George Gossnell.)

mately ten o'clock in the morning of that day, will you tell us about where you were driving at that time?

A. Well, I would say about 10 or 10:15 I remembered entering the town of Phoenix.

Q. The town of Phoenix?

A. I mean the city or town of Tempe. Going through, I have no remembrance much of what happened, just driving through as an ordinary person would on the right side of the road, and the next thing I saw was just a yellow flash in front of me, and that was as far as my knowledge runs as to what happened.

Q. Do you know where you were driving at that time?

A. I know I had passed the Tempe sign.

Q. Do you know whether you were driving on a highway, or what you were driving on at that time?

A. Well, I was on the regular highway from [4] Tucson to Phoenix through Tempe. I don't know what the number of it is, or anything like that.

Q. Maybe I didn't make myself clear. Do you recall whether you were on a bridge or not at that time?

A. No, I do not.

Q. Do you know what kind of a road you were driving on?

A. Well, I was driving on a paved road. It must have been, because it was a general road coming in. It had been all the way.

Q. Now, has this accident in any way affected

(Testimony of George Gosnell.)

your remembrance of things for that particular day?

A. Well, my memory is gone for maybe five to ten minutes before the accident, something like that.

Q. I mean, is it hard for you now to recall facts surrounding that accident?

A. Yes, it is. I remember very little of it. I have heard a lot from hearsay, and of course that confuses me with what really happened.

Q. All right. Now, who was riding with you in the car at that time?

A. My wife was in the front seat.

Q. What kind of a car were you driving?

A. I had a Buick 1950 Special sedan. [5]

Q. You were driving that car?

A. I was driving, yes, sir.

Q. And your wife was riding in the front seat with you?

A. She was on the right side.

Q. Was there anybody else riding with you at that time?

A. Yes, I had a passenger in the back seat who was driving over with me, because he wanted to see a cousin, I believe it was, in Arcadia.

Q. California?

A. California. That was about twenty miles beyond where I was driving, something like that.

Q. Now, what do you first recall after the accident, what do you first remember?

A. The first I recall after the accident is when I woke up in a bed, and somebody showed me a

(Testimony of George Gossnell.)

picture of a big bandage over my eye. That was my first remembrance of anything. That was the next day sometime.

Q. You mean you looked in a mirror, is that right?

A. Yes, I wanted to see how badly my face was damaged.

Q. This happened on a Friday, was it?

A. Friday, February 20th. [6]

Q. Now, where were you hospitalized, do you remember that?

A. Well, it was at Tempe Clinic, or Tempe Hospital, Dr. Pohle's hospital. Now, I don't know the name of it.

Q. Are you able to remember about how fast you were driving? Does that come back within the realm of your memory now?

A. Well, I was driving about 25 miles when I hit a town. I am not a fast driver, never have been a fast driver.

Q. How many years have you been driving a car?

A. Oh, since 1920. Possibly 34, 5 years.

Q. All right, now, Mr. Gossnell, for the past 13 or approximately 14 months, tell us what your condition has been?

A. You mean a detailed——

Q. Well, just tell us how you have spent your time. Have you been up and around, and what has been the situation?

A. I spent the time from February 20th to August 11th in bed in a hospital. Then I was home

(Testimony of George Gossnell.)

for approximately two months. I had a hospital cot at home. I was able to get up maybe ten minutes at a time and try to use crutches. But that didn't work. And October the 25th I had to go back to the [7] hospital, and they put the cast on.

Q. Are you still in a cast at the present time?

A. Up to my ribs, yes.

Q. Are you a little upset now? Do you want a few minutes? Are you composed enough?

A. No. I could go on. My emotions just kind of get away from me. I guess maybe I am a sissy.

Q. Are you in a cast at the present time?

A. Yes.

Q. And then except for that ten minutes or so a day that you were up and around, you have been in bed practically all the time, is that right?

A. I got so I could get up a little bit in a wheelchair to sit out, oh, for an hour a day, during the time I was home, the two months I was home.

Q. Now, if I understand your testimony correctly, there was a period of time from May, was it, to October, that you weren't in a cast, is that right?

A. No, it was from August. Yes. From my operation, open reduction in May 25th?

Q. Yes.

A. Until October 25th, I wasn't in a cast. I had an open reduction on my leg.

Q. Tell us at that time what support was given to your leg in place of a cast?

A. Well, they have two steel pins through [8]

(Testimony of George Gossnell.)

the, or below the break, and two above the break, with a steel plate they are attached to, and they hold permanently in there while the bone is attempting to grow.

Q. All right, now, did they remove those pins?

A. They removed those the 25th of October.

Q. Tell us what if anything happened when those pins were removed?

A. Well, of course I was in the hospital at the time, and the morning of the 27th when I went to take a bath, why, my leg doubled up on me. In other words, it hadn't calcified as much as they thought it should or had when they took the pins out, and so my leg doubled up on me, and the only thing they could do then was to put me in a cast, because they couldn't put new pins in.

Q. When you say your leg doubled up on you, you mean it rebroke again?

A. It didn't completely break; the bone bent so it had to be straightened out. It hung together in spots.

Q. But there was a sort of break there?

A. The break was clear through, except in a very few spots that the fiber or the calcium had helped.

Q. To remedy that situation, then, they put [9] you in a cast, and you are still in a cast, is that right?

A. That is right.

Q. Now, Mr. Gossnell, prior to the time that you sustained this injury in this automobile acci-

(Testimony of George Gossnell.)

dent of February 20th, 1953, what type of employment were you engaged in?

A. Well, I was a city salesman for the Messenger Printing Company. That is our daily paper.

Q. Is that in Fort Dodge?

A. Yes, in Fort Dodge, Iowa. That is our daily paper, and they have a bank and office supply that goes with it. I sell the bank and office supply stationery and any forms of printing that they happen to need.

Q. How long did you follow that type of employment?

A. I had been with them from 33 to 34 years.

Q. And were you still so employed at the time this accident happened?

A. I was. I was on my vacation.

Q. Have you worked at that employment since this accident? A. No.

Q. All right. What were your average annual earnings from that employment? [10]

A. They run approximately \$7,000 a year, as an average. Sometimes larger, sometimes smaller, but seven thousand would be a pretty fair average.

Q. Now, in connection with this accident, have you incurred medical expense and hospital bills?

A. A whole lot more than I can appreciate, yes. I say, a whole lot more than I can afford.

Mr. Wilson: I object to that as not responsive.

The Court: All right. It isn't.

Q. (By Mr. Raineri): Have you paid those bills? A. I have paid bills, yes.

(Testimony of George Gossnell.)

Q. Have you paid all of the bills?

A. I haven't paid the doctor bills.

Q. And for what reason?

A. Well, I have been—Not knowing exactly how long I am going to be in this condition, I have been afraid to use the last little remnants of what I have left.

Q. And when you say remnants, what are you talking about?

A. Of my savings. It is a case of——

Mr. Wilson: Just a minute. I object as not responsive.

The Court: Yes. [11]

Q. (By Mr. Raineri): Now, did you have special nurses in connection with your care at the hospital?

A. I had special nurses around the clock at Tempe for some time, and I also had special nurses at Fort Dodge when I was home.

Q. How did you happen to have these special nurses?

A. That was under the doctor's orders. They ordered them for me.

Q. Will you describe these injuries you sustained in this accident to us?

A. Well, I had a broken ankle, and a shattered knee, a compound fracture of the hip, and two broken ribs, and a skull fracture from my eye, up here. (Indicating.)

Q. Now, Mr. Gossnell, this injury, this skull fracture that you had, that has affected your

(Testimony of George Gosnell.)

memory, or you can't remember things like you could?

Mr. Wilson: I object to that as leading and suggestive.

The Court: He may answer.

The Witness: Yes, sir.

Q. (By Mr. Raineri): Now, what was the condition of your health before this particular accident? What if any ailments [12] of any kind did you have before this accident?

A. I had never had any sickness. I had had some, oh, I had had an operation for hernia, operation for tonsils, but my health was very good, because I went to the hospital once a year to be checked on. I was very careful about that, x-ray examinations, and everything. I played golf possibly two or three times a week, on Saturday and Sunday. I bowled a little bit. So my physical condition has been very good.

Q. Now, tell us how you felt. I mean, while you have been in bed all these 13 months, or better, just tell us whether you experienced any pain?

A. Well, the nine weeks I was in Tempe I had pain practically all the time from the breaks. Then I had an embolism, and I had two or three other, what he called complications—I believe the doctor knows more about that than I do—that would knock me out for about eight or ten days' time. They were stomach complications of some kind.

Q. Are you through?

(Testimony of George Gossnell.)

A. Well, I was going to say I had been there the nine weeks. It was more or less that I was suffering all the time, because the majority of the time they put two and three hot packs a day on me, taking medicine regular, and everything like that [13] for the different ailments.

Q. Now, state whether or not from and after that time you have experienced any pain down to the present date?

A. Well, I got home April 25th, and I was operated on May 25th. That one month was used as sort of a build-up period. I had gone down in weight an awful lot, and the doctors were building me up so I could stand an operation. Then the 25th I had an operation, and it was very painful, and it was very painful for months getting up. I mean, being carried up out of bed, and being put in a wheelchair and having to sit in a wheelchair, and things like that. There was a great deal of pain connected with it, possibly not all the time, but a good share of the time, until I got home, and then the brace on my leg began to rub a little bit. That caused some trouble and pain, and things like that.

So it has been practically that almost all the time. I have always been in pain or uncomfortable.

Q. When you speak of an embolism, will you tell us what you meant when you said that?

A. All I know is what they tell me, is that it is a blood clot forms.

(Testimony of George Gosnell.)

Mr. Wilson: I object to the answer as calling for [14] hearsay.

The Court: Yes.

Mr. Raineri: All right, we will withdraw the question. Your witness.

Cross-Examination

By Mr. Gibbons:

Q. Mr. Gosnell, how long were you hospitalized in Tempe?

A. I was in Tempe nine weeks, I believe.

Q. And who were your doctors there at that time?

A. Doctor Pohle, and Dr. Hartman from the Grunow clinic.

Q. How many times did you see Dr. Hartman?

A. Either three or four times. I believe it was three times.

Q. Was your leg put in a cast at that time?

A. No, it was put in traction.

Q. And no cast was applied, is that correct?

A. Well, it was all wrapped up, and everything, in cloth, and it was in a cast a good share around the knee, and things. Now I don't remember too well back 14 months. I know I should know it.

Q. Now, at the end of the nine weeks in Tempe, you testified you returned to your home in Fort Dodge, Iowa, is that correct?

A. Yes, that is right. [15]

Q. And you were there again hospitalized in a hospital in Fort Dodge?

A. That is right.

(Testimony of George Gossnell.)

Q. What hospital was that?

A. That was St. Joseph's Mercy Hospital at Fort Dodge.

Q. Was a cast put on your leg there at that time?

A. No, the cast was put on my leg at Tempe Hospital, so I could return to Fort Dodge.

Q. In other words, they did put a cast on your leg at Tempe? A. That is right.

Q. Do you know when that was?

A. I would say offhand that was the Monday before the Saturday that I left, so I left on the 25th. That must be the 20th. I wouldn't absolutely swear to it, but I would say the cast was put on the 20th of April at the Tempe Hospital.

Q. How long did that cast remain on your leg?

A. That cast remained on my leg until it was taken off the 25th of May, when I was operated on.

Q. Now, by operated on, do you mean that the——

A. The open reduction, is what they call it.

Q. You mean they put a brace on, don't you?

A. Well, they put about a eight or nine inch [16] cut up your leg, and run the four pins through the bone. Oh, no, the leg was cut open, and two pins run clear through the bone there, and two below, with a steel plate on top.

Q. Well, what really happened, Mr. Gossnell, was that they took the cast off?

A. That is right.

(Testimony of George Gossnell.)

Q. And put in this steel support or brace for your leg, is that right, to hold it together?

A. They took my cast off, and they put the brace of steel pins in, yes.

Q. Now, who performed that?

A. That was Dr. Fred Knowles.

Q. Do you know what that system of treating a broken leg is called?

A. No reason why I should know. No.

Q. I just asked you, sir. And I think you testified, then, that this steel brace with the pins remained on your leg until——

A. October 25th.

Q. October 25th? A. That is right.

Q. And you said at that time you were taking a bath and the leg doubled up?

A. No. I was taken to the hospital. I had x-rays taken, and the x-rays showed that there was [17] growth there, and they decided that the growth was enough to have the pins removed. When they removed the pins, two days afterwards the leg, well, it bent on me.

Q. Bent, did you say it bent on you?

A. The bone.

Q. Didn't you say, Mr. Gossnell, that you went to take a bath when that occurred?

A. I didn't say I went to take a bath, no. I was in bed and the nurse was giving me a bath, yes.

Q. The nurse was giving you a bath——

A. Was giving me a bath.

Q. And what did you do, turn over?

(Testimony of George Gossnell.)

A. I turned over. I had these bars up here to turn on, and one person will stand there, the one giving me a bath will stand there, and they turned me over on this leg, and this one on this side holds my leg up in the air while they bathe me.

Q. That is when the leg bent, when they turned you over, is that right?

A. When they turned me over is when the leg bent or broke.

Q. And it was necessary to put your leg back in a cast after, wasn't it?

A. It was necessary to put my leg in a cast.

Q. Who applied the cast at that time, sir? [18]

A. Dr. Fred Knowles.

Q. Your ankle has completely healed now, has it not?

A. As far as I know.

Q. And the injury to your knee, has that healed?

A. That was healed, but it has left a very stiff knee.

Q. Well, you haven't been able to walk much yet on it, have you?

A. I tried for two months on crutches, tried to lift it, so I know it left a stiff knee.

Mr. Gibbons: That is all.

Q. (By Mr. Wilson): Mr. Gossnell, this Dr. Fred Knowles put what is known as a Knowles bridge on your leg, didn't he?

A. Yes. I had a book showing that.

Q. And you knew him previously?

A. Well, I knew him like I know other doctors or other customers in town that I know of.

(Testimony of George Gossnell.)

Q. This was a special kind of treatment that he had invented, was that true? That is what they told you, wasn't it?

A. Called a Knowles bridge. There wasn't any special treatment, or anything.

Q. Did you know of any other doctor who ever used that method? [19]

A. No reason why I should. I had only had one broken leg.

Q. I believe you stated you had a broken hip. You didn't mean that, did you?

A. How is that?

Q. You didn't mean you had a broken hip, did you?

A. I didn't mean I didn't?

Q. You didn't mean you had a broken hip, did you?

A. I had a broken femur. Did I say hip?

Q. Yes. A. I am sorry.

Q. The femur is the bone that connects the hip with the knee?

A. The femur is the one below, yes.

Q. Where did you play golf in Fort Dodge?

A. Well, I played golf at various places. They have, like most cities have that size, they have a few public places. They have a couple of clubs.

Q. The question is, where did you play golf?

A. I am telling you where I played, in a couple of public places. I played golf at the Riverview, and at the Fort Dodge Country Club.

Q. Were you a member of each place?

A. I was a member of the Fort Dodge Country

(Testimony of George Gossnell.)

Club. It was paid by the Messenger Printing Company, who was my employer. [20]

Q. How long were you such a member?

A. Well, that is hard to say how long I was a member. I have been a member for 10, 12, 15 years.

Q. I believe you testified under oath concerning this action in another instance, that you had paid all the doctor bills, is that not correct?

A. Not that I remember that I did. I remember no such question.

Q. You have the cancelled checks showing you paid the doctor bills, do you not?

A. The cancelled checks showing—No, sir, we have not.

Q. Where are they?

A. The doctor bills have not been—The doctor bills in Tempe have been paid, yes. The doctors, I mean the doctors in Fort Dodge have not been paid.

Q. Since you have been——

A. Now, I am saying that in the way that I have written no checks. My wife has tended to all business transactions, but to the best of my knowledge I will say that two doctors at Fort Dodge have not been paid.

Q. Since you have been in Fort Dodge, since this accident occurred, your company has carried on your business for you, have they not?

A. They have told me—I work on commission from [21] the Messenger Printing Company, and I have a list of possibly 30 to 32 customers in town

(Testimony of George Gossnell.)

who are designated as my own personal accounts. In other words, none of the other salesmen from Messenger can call them.

They agreed to give me the commissions coming in from these people while I was in this condition, but they did not know for how long they would continue to do so, and they did last year.

Q. And are they still doing it?

A. I don't know. I haven't been home since the middle of February. I have drawn it from them this year, that is all.

Q. When you returned to Fort Dodge from Tempe, how did you go? A. What was that?

Q. When you returned to Fort Dodge from Tempe, how did you go?

A. I went by an ambulance plane.

Q. Did you pay for it? A. I did.

Q. What did it cost? A. My wife did.

Q. What did it cost?

A. It has cost something over \$900. I don't know the exact figures. [22]

Q. Now, how do you know that your memory was affected by the skull fracture? How do you know that there is something you don't remember?

A. I certainly remember about where I was, or something like that.

Q. No, I mean your statement that your memory is affected by your skull fracture. How do you know that you don't know something that you don't know?

(Testimony of George Gossnell.)

A. That is rather a complex question, I would say.

Q. Would you just simply tell the court and jury how it is you know that your memory is affected by the skull fracture?

A. Simply because I have no memory of the accident.

Q. Excuse me——

A. And I was going to say, and little things slip, even. I forget little things right now, I mean, at different times.

Q. Now, of your own knowledge, Mr. Gossnell, things that you know of your own knowledge, and not what people have told you, do you know of anything that Pete Siebrand or Hiko Siebrand, or Siebrand Brothers Circus and Carnival did or failed to do that caused your present condition?

Mr. Raineri: I will object to that, your [23] Honor. It hasn't been shown that this witness is qualified. He was injured.

The Court: The answer is obvious. He doesn't know.

The Witness: I sure don't. Would you repeat the question?

The Court: You don't have to answer.

Q. (By Mr. Wilson): Do you know of your own knowledge of anything that Mr. Carroll did or failed to do that caused your present condition?

A. I have never seen Mr. Carroll. I have never seen Mr. Siebrand, except in the courtroom here.

Q. Do you know of any negligent thing they

(Testimony of George Gossnell.)

did that caused this thing, except what you have heard?

A. All I know about is from what I have heard. I was in no condition to——

Q. Your treatment was almost entirely by Dr. Pohle while you were in Tempe?

A. Well, he had assistants there.

Q. But under his direction?

A. Oh, yes. The head of the clinic, the head of the hospital.

Q. He runs a little private hospital, doesn't he?

A. I don't know. It is his hospital, I [24] understand.

Q. You know nothing of his special qualifications in connection with your broken leg?

A. Not a thing.

Q. You stated you have never seen Mr. Siebrand? A. Except in court.

Mr. Wilson: That is all.

Redirect Examination

By Mr. Raineri:

Q. Mr. Gossnell, how did you happen to take— You were asked questions concerning an ambulance plane. State to the jury why you took this ambulance plane back to Fort Dodge?

A. When Dr. Hartman came down to see me the last time, I believe that was a Saturday preceding the day they put me in a cast, and they said he

(Testimony of George Gossnell.)

couldn't operate on me because I had some drainage in the leg as yet.

Mr. Gibbons: I object to the hearsay statement.

The Court: Well, Mr. Wilson wanted to know about the cost of this plane.

The Witness: I was just leading up to it. So they put me in what they call a double spiker cast with your legs spread completely apart, with a bar between your knees holding you in that position. The bar is cemented in plaster of paris, [25] so you can't move at all. They would not take me on the train because they couldn't get me in the passageway. I tried to go on the, well, the planes to Kansas City and on. First they agreed they would take me if I would have five seats. I had to occupy four seats, because I was in a lying down position, could not sit up.

I agreed to this, but when they telephoned or telegraphed Los Angeles, they turned it down. They said they would not take anybody in that condition, so I could not take the train, I could not take the plane.

Somebody said that Mr. Moore here had an ambulance plane, and so I contacted him. That was the only way left to go home, and it was a case I wanted to get home at that time, or as quick as I could, because being pretty near three months out away from home is bad enough without being able to get back when you want to. So I thought I would take the opportunity to get home on the plane. That was the only way I could make it.

(Testimony of George Gossnell.)

Mr. Raineri: That is all.

The Court: Is that all?

Mr. Wilson: Yes.

Mr. Gibbons: Yes.

(Witness excused.)

The Court: We will suspend until 2:00 [26]
o'clock.

Keep in mind the court's admonition.

(Whereupon at 12 o'clock noon, a recess was
taken until two o'clock p.m. of the same
day.) [27]

Tuesday, April 13, 1954; 2:00 P.M.

The Court: Call your next witness.

Mr. Raineri: I call Mrs. Gossnell.

ESTELLA L. GOSSNELL

called as a witness in behalf of the plaintiffs, having
been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Will you state your full name, please?

A. Estella L. Gossnell.

Q. And where do you live, Mrs. Gossnell? [28]

A. Fort Dodge, Iowa.

Q. Will you talk a little louder so the Court and
jury and counsel here can hear you plainly?

A. Yes.

(Testimony of Estella L. Gossnell.)

Q. How long have you resided in Fort Dodge, Iowa? A. Since 1914.

Q. Now, directing your attention to the 20th day of February, 1953, will you tell us where you were on that day, where you started out from in the morning, and just what occurred?

A. Yes, sir.

We left Tucson around seven-thirty, probably, to go to Phoenix. We were going to see my daughter in Ontario, California, and we were going by way of Phoenix, to spend a few days there before we started for home. We left, well, after breakfast. It was around seven-thirty.

And we came into Tempe, I remember making that turn and going through the town, going on the bridge, and just going along in the traffic.

There was traffic on both sides, and this trailer, I noticed it off to the left here a little ways, just about like that door would be, and all of a sudden it just swerved right into us. And there was a terrific crash. [29]

And it pushed the car over, our car over just close enough to the sidewalk that goes along that concrete rail, pushed the car over, and, well, there was just a lot of falling glass and crashing, and my husband and I just bounced. I just went up in the air and came down again.

I was injured. I was hurt, but I looked down, and my husband was lying just right across the seat, with his head close to me. I must have been

(Testimony of Estella L. Gossnell.)

sitting—or else I was shaken over to the side of the car——

Q. Pardon me. What seat were you riding in?

A. I was in the front seat with my husband.

Q. Go ahead, Mrs. Gossnell.

A. And his face was all covered with blood, and that was the left side. It just opened like a rose petal, this gash here. And I noticed all the blood, and rolled down the window, and saw that I couldn't get the door open, rolled down the window and screamed for help, and by that time there was a lot of people there, and they all, of course, rushed to the scene, and in just a minute, well, it was just a few minutes, maybe five or ten minutes, and the ambulance came.

And in the meantime, the men around in the various cars that were on the bridge came and [30] raised the car up so that they could pull the door open, open the door so that—it was stuck against the concrete sidewalk—raised it so that they could get the door open, so that they could get my husband out.

If there hadn't been any sidewalk, we never could have got that door open.

Then we were taken to the hospital. We had to go to the closest one.

Q. What hospital were you taken to?

A. The Tempe Clinic Hospital.

Q. How long did you remain there?

A. We were there until the 25th of April.

Q. Approximately two months?

(Testimony of Estella L. Gossnell.)

A. Yes, a little more.

Q. Were you hospitalized along with your husband?
A. Yes, I was hospitalized.

Q. What injuries did you sustain, if any?

A. Well, I had some broken ribs, a couple broken ribs, and my chest bothered me. The bouncing sort of made a jamming, I guess, that is what the doctor said it was; and bruises all over, and black and blue marks.

My arms hurt so that it was hard for me to get in and out of bed. I could get on my [31] feet—when I could get on my feet I was all right, but it was very hard getting in and out of bed. And, of course, I felt like I should be up to be with my husband, because he didn't know whether I was alive or not.

Q. What doctor attended you, Mrs. Gossnell?

A. Dr. Pohle.

Q. Is that the same doctor that was attending your husband?
A. Yes.

Q. Now, back in Fort Dodge, Mrs. Gossnell, were you employed? Did you work?

A. Yes, I worked in the drapery department in a department store.

Q. You worked in a drapery department in a department store?
A. Yes.

Q. How much were you earning a month?

A. About \$150.00.

Q. Have you worked at all since this accident?

A. No, I haven't.

(Testimony of Estella L. Gossnell.)

Q. Was that because you have been taking care of your husband?

A. Well, I wasn't really able to work when we got home. I kept going as long as I was in Tempe, I kept up, but I was run down, and didn't realize it [32] until I got home.

When I got home, I found I couldn't, just couldn't for a while, and I had to get myself back in condition again.

And my leave was to be up the—I could go back the first of June, that was to be the end of my leave, the first of June.

Of course, I was not able to then. Then they extended it for me until October. By October—my husband came home the 11th of August, and I took care of him there, because he was able, he was well enough that he could go home for a while, and I could take care of him there. So then I couldn't go back in October.

Now they have extended my leave until May 1st. That is three weeks from now.

Q. Do you know the defendant, P. W. Siebrand? A. Sir?

Q. Do you know the defendant, P. W. Siebrand?

A. Yes, I met Mr. Siebrand. He came to see me on several occasions.

Q. And where did he come to see you?

A. In the reception room of the hospital, and then once I talked to him in a corridor.

Q. And when was the first time he came to see you? [33]

(Testimony of Estella L. Gossnell.)

A. Whether it was the first or the second day after, I don't know, because I was too sick and hurt, and probably shocked, that I don't remember. It was soon. It could have been the first day. It could have been the second day.

Q. Why did Mr. Siebrand first come to see you at the hospital?

Mr. Wilson: I object as calling for a conclusion.

Q. (By Mr. Raineri): Did he state why he was coming?

A. Well, he came to see how we were getting along, and how badly my husband was hurt, how I was feeling, and on the first occasion he was, he said he was very sorry that it all happened, and if there was anything he could do. He did ask me if I needed money. I said not at the moment.

Q. Was there any other——

A. Then he asked me, he said, "Can you drive?" I said, "Yes, I drive a car."

He says, "Well, I will buy you a new car, and you can take your husband home."

And I said, "Mr. Siebrand, Doctor Pohle said my husband wouldn't set his foot on the ground for three months." And there was nothing more said about that. [34]

Q. Now, you testified that P. W. Siebrand was over to see you more than once?

A. Yes, he was there once in the reception room I can't remember definitely when it was, but it was, I would say, a few days, or it could have been a week, I don't know.

(Testimony of Estella L. Gossnell.)

My husband was going through the crisis that first ten days, and a day meant nothing to me. I didn't know what day it was.

Q. Now, did Mr. Siebrand, or P. W. Siebrand ever ask you if you had anybody here that you knew, or that he could talk with, because of your condition? A. Well, yes.

Mr. Wilson: Just a moment. I object as leading and suggestive.

The Court: Yes, it is leading.

Q. (By Mr. Raineri): Well, did you have any other talk with him of any nature?

A. Well, he spoke about, when I was asking—I called that first night, the first afternoon, when I was able to phone, I phoned to Tucson. I called Mr. Clark first; Fred Clark was a friend of ours there, and I couldn't get him. He wasn't home. So I wanted to see somebody that I knew, some familiar face. [35]

Q. Who is Mr. Clark?

A. He was a friend of my husband's.

Q. Where does he live?

A. He lives in Fort Dodge also.

So I called the manager of the motel. He was the only familiar face I would know. This Mr. Bill Butler was the manager of this motel, and he came up to see me with another man who was in the motel at the time my husband was there, Mr. De Francisco from Chicago, a young fellow that was there. They came up to see me, but Mr. Clark didn't come until the next day.

(Testimony of Estella L. Gossnell.)

Q. The day following the accident.

A. The day following the accident.

Then is when I told him that Mr. Siebrand wanted to see him as soon as he came into town, so I told him that.

Q. Pardon me. Had Mr. Siebrand told you he wanted to see——

A. Yes. Mr. Siebrand told me that the day I was talking with him, because I had mentioned Mr. Clark and this other man who had come up to see me just out of friendship, and I told Mr. Clark when I called him, when I phoned him, that Mr. Siebrand wanted to see him. So he must have gone over to see him in Mesa, I think it was. [36]

Q. On any of these occasions that Mr. P. W. Siebrand came over to see you, was anybody else ever with him?

A. Yes, he brought Mr. Carroll.

Q. Who is Mr. Carroll?

A. Mr. Siebrand introduced him as the man who was driving the truck for him that day, and he brought him over to meet us.

Mr. Wilson: Just a moment. I object to the answer as not responsive, and I move it be stricken as prejudicial to this defendant.

I had no warning that the answer could possibly be that.

Mr. Gibbons: May we have the time and place fixed, your Honor, with reference to the defendant Carroll?

The Court: The answer may stand. Go ahead.

(Testimony of Estella L. Gossnell.)

Q. (By Mr. Raineri): All right, when was this, that is, that he brought over Mr. Carroll? Do you recall when that was?

A. It was some days following. It could have been two weeks. I really don't know.

But I do know they came over, and I met Mr. Carroll and Mr. Siebrand, and I didn't talk to Mr. Carroll at all. He just said, "How do you do?" [37]

I don't remember a word of conversation. Mr. Siebrand and I talked. He asked about my husband, and then—that was one of the other times.

Q. Now, what speed was your husband driving? I neglected to ask you that at the time.

A. We were just following in the line of traffic, and I think over that bridge it is around 25 miles an hour. We were just following along like you do in traffic.

Q. Now, do you have a record of bills that were paid in connection with the injuries your husband sustained? A. Yes, I do have.

Q. And the injuries you sustained?

A. Yes.

Q. Do you have those bills here in the courtroom? A. Yes, I do.

Mr. Raineri: Mark this Plaintiffs' Exhibit 1 for identification.

(Said document was marked Plaintiffs' Exhibit 1 for identification.)

Q. (By Mr. Raineri): I show you Plaintiffs'

(Testimony of Estella L. Gossnell.)

Exhibit 1, so marked for identification, and ask you what those are, if [38] you know?

A. These are the receipts of all of the bills that have been paid, except the doctor bills.

That bill is just pending now, but these are all the receipts, and the cancelled checks. The nurses, those are all nurses.

And these are the doctor bills from the hospital in Fort Dodge, and the hospital in Tempe, and the doctor bills in Tempe.

This is medicine. This is the ambulance plane.

Q. Now, have you examined these to your satisfaction? A. Yes.

Mr. Raineri: May these be marked as Plaintiffs' Exhibit 2 for identification?

(Said documents were marked as Plaintiffs' Exhibit 2 for identification.)

Mr. Raineri: We will offer these in evidence, your Honor.

The Court: Any objection?

Mr. Gibbons: If the Court please, I don't think the witness has identified them yet.

The Court: Have you any objection?

Mr. Gibbons: Yes, I do, on those grounds.

Mr. Raineri: I asked her if those were [39] the bills.

The Court: He asked her if they were the bills.

Mr. Raineri: She said they were. I will go into it in a little more detail.

(Testimony of Estella L. Gossnell.)

Mr. Gibbons: All right. I will withdraw the objection.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit number 1 in evidence.

(Said documents were received in evidence and marked Plaintiffs' Exhibit number 1.)

Q. (By Mr. Raineri): Now, I will ask you, Mrs. Gossnell, have you totaled up all these various bills? Have you added them up?

A. Yes, I have.

Q. Are you able to tell the Court and jury just what you spent for various items that appear in these bills?

A. Yes, sir.

Q. All right. Will you tell us as briefly and quickly as possible just what those sums are?

A. The nurses' bills were the largest, which is always the case. [40]

Nurses' bills were \$3,888.00.

Q. Will you speak a little louder?

A. The nurses' bills were \$3,888.00. That was for three special nurses, the first about four or five weeks. Then I let one nurse go, and I helped at night, because I was right next to him, and I was able to get up and make him comfortable at night.

Then we had two nurses when we went back to Fort Dodge. He had to have these two special nurses because he needed constant care to make him comfortable.

Then when he had his operation, he had to have

(Testimony of Estella L. Gossnell.)

the nurses, but we let the nurses go in the first couple weeks in July. And then he was on general care from then on.

Q. Do you have any other item now?

A. Then for Tempe. In Tempe, this is the nurses.

This is the hospital bill, and the doctor bill. This doctor bill is paid. Dr. Pohle's bill is paid. That was \$2,752.00.

And the Fort Dodge Hospital, St. Joseph's Mercy Hospital in Fort Dodge is \$2,900.00.

Then we built a ramp from the front door down the steps; he couldn't walk down those [41] steps with his crutches, it was dangerous. So we built a ramp. That was \$66.00.

Then the amount of medicine we had at home and during those months was \$85.00 for the medicine.

Doctor Knowles' bill, which is not paid, the two doctor bills are not paid; Doctor Knowles, \$960.00. He is the surgeon.

Q. Nine hundred sixty dollars? A. Yes.

Q. All right.

A. And Doctor Dawson, he is the M.D., his is \$350.00.

Q. Three hundred fifty dollars?

A. Three hundred fifty dollars.

Q. All right.

A. And the ambulance, we had an ambulance from the airport, and back and forth home. The ambulance, there is one here that is \$9.00. Then

(Testimony of Estella L. Gossnell.)

there is ambulance back and forth home, that must have been that time, that was \$33.00.

Doctor Hartman's bill here in Phoenix was \$75.00.

And then the ambulance plane we took home was \$909.00.

Q. Does that complete all the bills? [42]

A. That is what I have here, yes, sir. There are many other incidentals, but I didn't put them down.

Q. Now, Mrs. Gossnell, you testified that you spent considerable time with your husband while he was hospitalized? A. Yes.

Q. On those occasions did you ever notice whether he was in observable pain or not?

A. In Tempe, yes, definitely.

Q. What about back in Fort Dodge?

A. In Fort Dodge—you see, in Tempe, I was right at the hospital, I was right with him day and night for nine weeks. I didn't leave the hospital grounds, only maybe the last two or three weeks they made me walk to town and back to get a little exercise.

But I was with him practically all the time, so I could observe him.

But in Fort Dodge, he had his two special nurses, and I went out every afternoon and every evening, and I was there a few times when they were getting him into the wheelchair, which was very painful.

It took the orderly and two, and sometimes three nurses to handle him, to get him in [43] that wheelchair, so he wouldn't have too much pain.

(Testimony of Estella L. Gossnell.)

He suffered very much.

Q. Mrs. Gossnell, when Mr. Siebrand was over to see you on those several occasions, did he at any time ever leave a card with you?

A. Yes, he left me his card the first time he was over.

Q. I show you Plaintiffs' Exhibit Number 2 so marked for identification, and ask you if that is the card that he left with you? A. Yes, it is.

Q. Is that right? A. Yes, that is right.

Mr. Raineri: We will offer this in evidence, your Honor.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 2 in evidence.

(Said document was received in evidence and marked Plaintiffs' Exhibit 2.)

Mr. Raineri: Your witness.

Cross-Examination

By Mr. Wilson:

Q. Mrs. Gossnell, you have cancelled checks for these items, do you? [44] A. Yes, sir.

Q. Now, how long has this cast been on Mr. Gossnell?

A. The one he has on now has been on since the 27th of October.

Q. What year? A. 1953.

Q. Has he been examined since then?

A. He had an X-ray just before we left.

Q. When would that be?

(Testimony of Estella L. Gossnell.)

A. That was, let's see, we got here, it was the 20th—now, I don't know. That was about just three or four days before we left Fort Dodge, and we left Fort Dodge the 25th of February. That was the last X-rays that were taken there.

Then when we got here, Dr. Hartman took one immediately. That would be the Monday following, we got here on Friday, that would be the Monday following. I don't know what date that would be.

Q. Did you see Dr. Hartman take that X-ray?

A. No, sir, I didn't.

Q. How do you know he took it?

A. His technician would take it.

Q. How do you know that he took it?

A. Well, I don't know. I would take Dr. [45] Hartman's word for it. He is a reputable surgeon.

Q. Then you are saying to us that he told you he took it, is that correct?

A. No. He didn't take it. The technician did.

Q. You are saying to us that he told you he took it?

A. No, sir. No, I say I would take his word for it if he said that that was the X-ray, I would take his word that it was.

Q. Did he say that he took it? A. No, sir.

Q. How do you know that he took an X-ray immediately upon your arrival here?

A. Well, I shouldn't have said that he took it, because he doesn't take X-rays. The technician at the Grunow Memorial Clinic took the X-ray.

Q. You heard Dr. Hartman testify in this mat-

(Testimony of Estella L. Gossnell.)

ter previously, where he stated that he had not examined the man since he had returned to Phoenix, because he was in a cast? Did you not hear that testimony?

A. I didn't understand that, sir.

Q. Did you hear Dr. Hartman testify in this matter previously that he had not examined Mr. Gossnell since he had been back in Phoenix, [46] because he had a cast on?

A. Well, that is a complicated question, he examined him.

Mr. Raineri: May it please the Court, that is a mis-statement of the testimony.

The Court: I don't remember. He started out by asking whether there had been an X-ray taken.

Mr. Raineri: The doctor testified he took an X-ray here, Dr. Hartman.

The Witness: He examined him otherwise, too.

Mr. Wilson: Just a moment, now, your Honor. I am examining the witness, not counsel. If you want to argue the case at the present time, I am afraid——

Mr. Raineri: No, but I don't think the evidence should be mis-stated. That is the only point I make.

Mr. Wilson: May I examine the witness, your Honor?

The Court: If you do it properly, you may.

Q. (By Mr. Wilson): Mrs. Gossnell, did you hear Dr. Hartman state from this stand when he was here previously, after you had returned to Phoenix in February, that as far as he knew, of

(Testimony of Estella L. Gossnell.)

his own knowledge, Mr. Gossnell [47] might have been well at that time, because he had the cast on, and he could not examine him?

A. I don't remember of him saying those words.

Q. Did you hear him say anything to that effect?

A. Well, he would have no way of knowing whether his leg was all right.

Q. Pardon me. Don't reason the matter out. Just state——

The Court: She might not even have been in the courtroom when he said that. If you have the record on that, you might read it.

Q. (By Mr. Wilson): Mrs. Gossnell, did you see the deposition of Mr. Clark that was taken recently in Fort Dodge? A. No, sir.

Q. Were you told of its contents?

A. No, sir.

Q. Did you know the deposition of Mr. Clark was recently taken in Fort Dodge?

A. I knew it was to be.

Q. I believe you stated that Mr. Siebrand came to see you, and that he asked how you were, and how Mr. Gossnell was? A. Yes.

Q. And if you had any money? [48]

A. Yes. Well, no, he didn't say, do we have any money. He said, "Do you need money?"

Q. And he asked you if you needed any help, or anything of that sort, or something to that effect?

A. Just if there was anything to make us more comfortable, just like everyone else did.

Q. And then on another occasion, as you stated,

(Testimony of Estella L. Gossnell.)

it might have been two weeks later, he came to the hospital with Mr. Carroll? A. Yes.

Q. Would you answer audibly?

A. Yes, sir, he did. He came with Mr. Carroll.

Q. Was anyone else present when Mr. Carroll was there?

A. I don't remember. They were all strange faces. There were a lot of people in that reception room at that hospital, and there may have been others. They could have been either visitors or patients. There were people in there, but I talked to Mr. Siebrand, and Mr. Carroll was there, and there could have been other people there, but whether or not they were with him I wouldn't know. I don't think so.

Q. Do you recall talking to Dorothy Dalton?

A. Yes, sir. [49]

Q. And you know my secretary, Dorothy Dalton? A. Yes.

Q. And her sister lives across the street from you in Fort Dodge? A. That is right.

Q. A while ago your counsel asked you if Mr. Siebrand came there with Mr. Carroll, and then you reiterated some conversation that Mr. Siebrand made with you while he was there.

Would you tell us again what that was?

A. Mr. Siebrand introduced me to Mr. Carroll and said, "This is Mr. Carroll, the man who was driving the truck for us that day, and I brought him over to see you."

Q. Did he say anything else?

(Testimony of Estella L. Gossnell.)

A. And I spoke to the man just briefly.

Oh, then I didn't talk to Mr. Carroll, and Mr. Carroll asked about my husband, and I don't remember the conversation. I just don't remember all of it.

Q. It was just general?

A. Just like most people asked.

Q. Now, I will ask you, Mrs. Gossnell, if it was not a fact that Mr. Siebrand said to you that this is Mr. Carroll who was driving the truck?

A. No, sir. No. [50]

Q. And that he did not say "Driving the truck for us"?

A. He said, "This man was driving the truck for us that day."

Q. Mr. Siebrand said that to you? A. Yes.

Mr. Raineri: What is your answer?

The Witness: I said "Yes."

Mr. Raineri: She is taking it down, so you will have to answer yes.

The Witness: Oh.

Q. (By Mr. Wilson): What did Dorothy Dalton say to you that day?

A. She told me, she said, "I am Mr. Siebrand's lawyer's secretary."

And she said, "When I learned that you lived—I knew that you lived across the street from my sister, and they brought me over to see you."

And then we stood there and visited. Mr. Siebrand sat down on the davenport behind us.

(Testimony of Estella L. Gossnell.)

Q. I want you to tell us what you and Miss Dalton said to each other.

A. She told me who she was, and we talked about Fort Dodge mostly. There was nothing said. She asked how my husband was, and we talked about Fort Dodge, and not for very long, but it was not anything [51] about anything but generalities.

Q. Did she make you any offer of settlement?

A. Did Miss Dalton?

Q. Yes. A. No, sir.

Q. Was I there?

A. I never had seen you until recently.

Q. Until in this courtroom?

A. That is right.

Q. Did Mr. Siebrand say anything else other than that it was Mr. Carroll who was driving the truck for us? Did he say anything else?

A. Just asked about my husband, and how we were getting along. I don't remember anything else that was said except——

Q. Now, with regard to the time that Mr. Siebrand talked to Mr. Carroll, was this before or after he talked to Mr. Carroll, do you know?

A. You mean when he was with Mr. Carroll?

Q. Yes.

A. I talked to Mr. Siebrand, like I say, either the first or second day, and told Mr. Clark when I phoned him——

Q. What I am talking about now, this time when Mr. Siebrand was there and introduced Mr. Carroll as the man who was driving the truck for him? [52]

(Testimony of Estella L. Gossnell.)

A. Yes.

Q. Had Mr. Clark already talked to Mr. Siebrand like you had said he would do? A. Yes.

Q. Before that Mr. Clark had talked to Mr. Siebrand? A. Yes, sir.

Q. Now, as a matter of fact, Mrs. Gossnell, you know perfectly well that Mr. Siebrand came to see you out of a human motive, and nothing else on earth, do you not, and that he never made any such statement to you as that Mr. Carroll was driving the truck for him?

You know that to be a fact, don't you?

A. I don't understand that question.

Q. I say, you know Mr. Siebrand came to see you out of purely a human interest, to see that you weren't lying in the street, with no funds, and that he did not come there and tell you Mr. Carroll was driving the truck for him?

A. The first time Mr. Siebrand came——

Q. We are talking about the time he came with Mr. Carroll.

A. I don't remember whether he said——

Q. What about the first time? What did he say the first time? [53]

A. The first time Mr. Siebrand came?

Q. What day was that?

A. That was either the first day, the same day, or the next day.

Q. He came to the hospital?

A. Came to the hospital, yes.

Q. And you were pretty sick, were you?

(Testimony of Estella L. Gossnell.)

A. Well, they came and got me out of my room.

Q. And you walked into the reception room and talked to Mr. Siebrand?

A. I talked to him in the corridor that first time.

Q. In the corridor of the hospital?

A. As you go into the reception room, he was probably coming into the room, but my husband couldn't have any visitors, so they didn't get that far.

Q. Was he by himself?

A. That time he was by himself, so far as I know.

Q. And you talked to him? A. Yes.

Q. And what did you say to him, and what did he say to you?

A. That is the day that he asked about my husband, and wanted to know if we had a good [54] doctor, and if my husband was in good health.

And I told him all about that. And he asked me if we needed money. Then is when he said, he asked me if I could drive a car. And I said yes, I could drive.

He says, "I will buy you a car, and you can drive your husband home."

Q. That is the first time, he said that?

A. That is the first time that I saw him, I believe.

Q. Did he say anything else?

A. Oh, we stood there and visited.

Q. I know, but I mean anything that has got to

(Testimony of Estella L. Gossnell.)

do with this lawsuit. Did he say anything else? Did he say he liked you?

A. Oh, no. I told him about knowing these people in Tucson, that Mr. Clark was coming up to see us, that I was not able to do anything for myself, I didn't know anybody. And Mr. Clark had offered, if we needed anything or wanted anything, he would come up and do it. And he said if Mr. Clark——

Q. Why didn't you testify before as you testified today, that the first time Mr. Siebrand saw you, he offered to buy you a car?

A. You didn't ask me. [55]

Q. You didn't so testify, did you?

A. No, I don't think so.

Q. You don't recall my asking you, you don't recall them asking you?

A. You didn't ask me that. You didn't ask me if he offered me money. You asked me if Miss Dalton offered me money.

Q. I am talking about the first day when Mr. Siebrand came to see you, and you talked to him by yourself, and he was by himself, in the corridor?

A. Yes.

Q. You didn't testify before that he said he would buy you a new car?

A. No, because you didn't ask me that.

Q. But you do remember that he said that?

A. Yes.

Q. Did he say anything else? I am talking about did he say anything else about doing something for you?

(Testimony of Estella L. Gossnell.)

A. Well, when he spoke about if I needed money, I said not at the moment, I don't need any money. But I said I could get money if I needed it.

Q. Now, when Mr. Clark returned from talking to Mr. Siebrand in Mesa, where you had sent him just prior to the time Miss Dalton and Mr. Siebrand and Mr. Carroll went down to Tempe to see you [56] the second or third time, the first time they went down all together, did Mr. Clark tell you of the conversation he had with Mr. Siebrand?

A. No, I didn't talk to Mr. Clark.

Q. You didn't talk to him?

A. Well, he was there. He came in several times the first two or three weeks.

Q. I am talking about when he came back from talking to Mr. Siebrand in Mesa.

A. I don't remember him coming in. I may not have been in the room. I may not have been there. I don't know.

Q. When he came back from talking to Mr. Siebrand in Mesa, did he tell you what Mr. Siebrand said?

A. Not that I remember a thing about that, no, sir.

Q. To refresh your memory, I will ask you if Mr. Clark—now, let's see, Mr. Clark is a friend of yours, isn't he? A. Yes.

Q. And he lives in Fort Dodge? A. Yes.

Q. And he runs a packing house there, except he is retired? A. Yes. [57]

(Testimony of Estella L. Gossnell.)

Q. And he was in Tucson the night before you had the accident? A. Yes.

Q. He came up from Tucson, and you told him to go up and see Mr. Siebrand? A. Yes.

Q. And Mr. Siebrand was in the show at Mesa?

A. Yes.

Q. And he went a little less than two weeks after the accident? A. Yes.

Q. I will ask you if Mr. Clark said to you when he returned from seeing Mr. Siebrand that he had said to Mr. Siebrand:

“I understand you wish to see me.”

And that Mr. Siebrand had said to him, “I do.” And that he said, “And I am so sorry about this accident.”

And that he told Mr. Siebrand that Mrs. Gossnell had said that Mr. Siebrand wanted to see him. And that Mr. Siebrand said he was so very sorry about the accident, and that he was going to stand all damages, and would buy them a new car at once, because theirs was wrecked beyond repair.

Didn't he tell you that when he came [58] back from Mesa?

A. I think he told my husband.

Q. I don't care about that. Did he tell you?

A. I don't remember whether he told me or not.

Q. When was your husband able to have visitors?

A. There were times even during that first week when he wanted to see a close friend. No one, except somebody he knew very well was permitted to see him.

(Testimony of Estella L. Gossnell.)

Q. You said he was too ill to see Mr. Carroll, Mr. Siebrand, and Miss Dalton after Mr. Clark had returned from Mesa?

A. Yes. There were people from Phoenix and Tucson came over to see us, but they would not allow them to see him, except probably Mr. Clark and this man from the motel.

Q. I will ask you if Mr. Clark told you when he returned from seeing Mr. Siebrand at Mesa that Mr. Siebrand was going to put this in writing?

A. I never heard that.

Q. And I will ask you further if Mr. Clark told you when he returned from talking to Mr. Siebrand in Mesa, at your request, that he didn't want to get any lawyers into this matter, as they would drag the case through the courts for several years, and that he would pay all damages, and buy [59] you a new car?

A. I have no recollection of it put that way. I was not even interested in lawsuits. I didn't think about it. My mind was occupied elsewhere, and Mr. Clark, I left him, he just did whatever he wanted to do. I have no head for business, and if they were going at it that way, I didn't know anything about it.

Mr. Wilson: That is all, Mrs. Gossnell.

Mr. Gibbons: I have a few questions.

Q. (By Mr. Gibbons): Mrs. Gossnell, did you see the vehicle driven by Mr. Carroll before this collision occurred?

A. No.

Q. You didn't see it at all?

(Testimony of Estella L. Gossnell.)

A. No. I saw the trailer just from a short distance before it hit us.

Q. That is the first thing that came to your attention, then, was when the trailer was——

A. It was just——

Q. ——headed in your direction?

A. Headed our way. And I realized it was loose, that it was a loose trailer; I had time enough just for that.

Q. But you didn't see anything before that?

A. No, I didn't see the truck or trailer. [60]

Q. Did Mr. Carroll make any statements to you at the time you referred to in your testimony, when he was at the hospital where you were?

A. I don't remember him saying a word. I don't believe he did. I talked with Mr. Siebrand.

No, sir, I don't remember having any conversation with Mr. Carroll.

Q. Isn't it a fact that he told you there at that time that the hitch had broken, and he was sorry it had happened?

A. I don't remember that.

Q. Now, what treatment did you receive, Mrs. Gossnell, for the bruised or broken ribs that you referred to?

A. I just had an Ace bandage wrapped around me.

Q. That is the only treatment you received for that?

A. No. I had these hot steam packs on my chest and on my back, and that was all the treatment I received, except my—I had a couple of kinds of

(Testimony of Estella L. Gossnell.)

medicine, and had an injured arm that gave me more trouble than that, but it required no treatment, just had to get well by itself.

Q. You had no treatment for the arm at all, is that right? [61] A. No.

Q. Or for any of these bruises you referred to? There was no treatment for those also?

A. No, no. Just for my chest. The steam packs, I had those for many, many days, and this Ace bandage I wore, I wore that for several weeks.

Q. And did you receive any medical attention in connection with these bruised ribs after you returned to Fort Dodge?

A. I was going to say, in Tempe I did have a cut under my chin here, and when we entered the hospital, this doctor, not Dr. Pohle but another one in there sewed this up. That was the only other one. That doesn't show.

And then when I got back to Fort Dodge, no, I just had to take care of myself, and get myself back on my feet.

Q. You didn't have any further medical attention?

A. I had an X-ray, a chest X-ray, because I was still having pains in my chest.

Q. Mrs. Gossnell, do you know of any careless or reckless thing that you saw, yourself, that Mr. Carroll did?

Mr. Raineri: I will object to that, your Honor. I don't think she is——

(Testimony of Estella L. Gossnell.)

The Court: She didn't see it. She couldn't [62] say.

Mr. Gibbons: That is all.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Raineri: Your Honor, I forgot to offer here the damage to the car. We have got an exhibit here.

Mr. Wilson: We can stipulate to that, can't we.

Mr. Raineri: Yes. It is \$1,474.00. We will offer the bill in evidence.

The Court: All right.

Mr. Raineri: That is Plaintiff's Exhibit 3.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(Said document was received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Raineri: I will call P. W. Siebrand as an adverse witness.

P. W. SIEBRAND

called by the plaintiffs as an adverse witness, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Raineri:

Q. Your name is P. W. Siebrand? [63]

A. Yes, sir.

Q. And you are one of the defendants in this case?

A. Yes, sir.

(Testimony of P. W. Siebrand.)

Q. And you and your brother, Hiko Siebrand, are co-partners that run a circus and carnival known as Siebrand Brothers Circus and Carnival, is that right? A. Yes, sir.

Q. You have heard the testimony that has been given here so far regarding a truck pulling a trailer?

A. Yes.

Q. Was that truck that was pulling the trailer owned by you? A. Yes, sir.

Q. It was owned by you and your brother, is that right? A. Yes, sir.

Q. And this trailer was owned by a William Siebrand, is that right? A. That is right.

Q. And William Siebrand is a nephew of yours?

A. That is right.

Q. Now, William Siebrand, what connection did he have with your circus and carnival? [64]

A. He was a concessionnaire.

Q. He had a concession? A. Yes.

Q. Now, outside of concessions, you had rides and other equipment in your circus and carnival, is that right? A. Yes.

Q. And who owned the rides? A. We do.

Q. That is, you and your brother?

A. Yes, sir.

Q. William Siebrand had nothing to do with the ride part of the carnival? A. No.

Q. You and your brother had exclusive ownership? A. Yes, sir.

Q. And control of the rides, is that right?

A. Yes, sir.

(Testimony of P. W. Siebrand.)

Q. And any money that was derived from any ride equipment went solely to you and your brother, is that right? A. That is right.

Q. And William Siebrand had no connection whatsoever with that? A. No, sir. [65]

Mr. Raineri: That is all.

Mr. Wilson: No questions.

(Witness excused.)

Mr. Raineri: Your Honor, we have a deposition here that we took of Mr. Clark in Fort Dodge, Iowa, and we would like to offer that and to read it into evidence.

The Court: All right.

(Whereupon, the deposition of Mr. Fred J. Clark was read into the record.) [66]

The Court: We will have our afternoon recess at this time.

(A recess was had.)

The Court: You may proceed.

Mr. Raineri: May the deposition be marked as Plaintiffs' Exhibit 4 in evidence?

Mr. Gibbons: If the Court please, I would like at this time to move to strike the testimony of the previous witness, Fred Clark, as to the defendant, S. J. Carroll, since it purports to be a conversation which occurred several days after the accident, and not in his presence. It doesn't even purport, your Honor, to bind him in any way whatsoever.

The Court: I will consider that. Go ahead.

Mr. Raineri: We will offer the deposition. It is marked Plaintiffs' Exhibit 4, and we will offer that in evidence.

Mr. Wilson: If the Court please, may I object on behalf of Hiko Siebrand, on the grounds stated by Mr. Gibbons, on the ground it is not binding, a conversation occurring after the occurrence, and not in his presence?

The Court: All right.

Mr. Raineri: Is that received?

The Court: It is already in the record. I [67] don't know what you want that for.

It may be received.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(Said deposition was received in evidence and marked as Plaintiffs' Exhibit 4.) [68]

PLAINTIFFS' EXHIBIT No. 4

In the District Court of the United States for the
District of Arizona

Civil Action No. 1875 PHX

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiff,

vs.

P. W. SIEBRAND, HIKO SIEBRAND d.b.a.
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL and S. J. CARROLL,

Defendants.

April 5, 1954

Appearances:

MR. B. B. BURNQUIST,

Of Fort Dodge, Iowa,

Appeared for the Plaintiffs.

MR. MAURICE J. BREEN,

Of Fort Dodge, Iowa,

Appeared for the Defendants.

Deposition of Fred Clark, a witness of lawful age, taken on behalf of the plaintiffs in the above-entitled cause, wherein George F. Gossnell and Estella Gosnell, his wife, are the plaintiffs, and P. W. Siebrand, Hiko Siebrand, d.b.a. Siebrand Brothers Circus and Carnival, and S. J. Carroll, are defendants, pending in the District Court of the United States for the District of Arizona, pursuant to the notice hereto attached, before Wilma F.

Plaintiff's Exhibit No. 4—(Continued)

Devlin, a certified shorthand reporter in and for the Eleventh Judicial District of Iowa, at Fort Dodge, Iowa, on the 5th day of April, 1954.

* * *

Mr. Burnquist: This deposition is taken under notice of taking deposition. Notice was served on Francis W. Wilson, Phoenix National Bank Building, Phoenix, Arizona, and Howard W. Gibbons, First National Bank Building, Phoenix, Arizona, attorneys for defendant, on the 26th day of March, 1954, by mailing said notice to them.

It is further understood that Maurice J. Breen is appearing on behalf of defendants at the taking of the deposition.

It is agreed that oath may be administered by Wilma F. Devlin, an official court reporter of the Eleventh Judicial District of Iowa, who, under the laws of Iowa has the same authority to administer oaths as a notary public, and the fact that she is not a notary public is waived and her competency is not questioned.

It is further agreed that the testimony of Fred Clark may be taken before her and that she shall take down the questions and answers in shorthand and transcribe the same, and upon such transcription forward a true transcript of said testimony to the Clerk of the United States District Court of the District of Arizona, at Phoenix, Arizona, and that her certificate as to the accuracy of the said transcription shall be accepted by all parties hereto.

Plaintiff's Exhibit No. 4—(Continued)

FRED CLARK

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Burnquist:

Q. Your name is Fred Clark?

A. Fred J. Clark.

Q. The name is Fred in the notice. You were the Fred Clark, you assume, who is named in the notice to take this deposition? A. Yes.

Q. How old a gentleman are you, Mr. Clark?

A. I am sixty.

Q. For a number of years you have been connected with the Tobin Packing Company at Rochester, New York, and Fort Dodge, Iowa?

A. Yes.

Q. How long were you connected with them?

A. Indirectly or directly thirty-nine years.

Q. You retired three or four months ago?

A. July of last year.

Q. At the time of your retirement what position did you occupy with Tobin Packing Company of Fort Dodge?

A. I was vice-president of the company and director and manager of this plant.

Q. Of the Fort Dodge Division? A. Yes.

Q. Mr. Clark, are you acquainted with George F. Gossnell and Estella Gossnell, the plaintiffs in this case? A. Yes.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

Q. How long have you known them?

A. About fifteen years.

Q. You are not in any wise related to them or connected with them in business in any way?

A. No.

Q. And never have been? A. No.

Q. Your acquaintance has been casual or as any other citizen of Fort Dodge? A. Yes.

Q. Mr. Clark, were you in the State of Arizona in February, 1953? A. Yes.

Q. Where were you staying along about the latter part of February? A. Tucson.

Q. Did you see the plaintiffs, Mr. and Mrs. Gossnell, while you were down there?

A. Yes, many times.

Q. Do you recall the occurrence along in the twenties of February, of Mr. and Mrs. Gossnell having a collision with their automobile and a trailer truck or trailer? A. Yes.

Q. What date do you think that was?

A. It was on a Friday, about the 20th of February.

Mr. Breen: What year?

The Witness: 1953.

Q. (By Mr. Burnquist): Had you seen the Gossnells prior to that time?

A. The last time I saw them was the evening previous.

Q. The evening before the accident?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

A. Yes.

Q. You were both in the same town?

A. Yes.

Q. And you left them in the evening. Had you dined together or——

A. We dined at the Elks Club the night before the accident.

Q. You heard about the accident from some source?

A. My wife had advised me at about five o'clock.

Mr. Burnquist: I don't care, Mr. Clark, as to any hearsay testimony, but you heard about the accident shortly after it occurred? A. Yes.

Q. Did you go to see Gossnells after you heard about the accident?

A. Yes, the next morning, on Saturday morning.

Q. Where were they?

A. In the hospital at Tempe, Arizona.

Q. In general what was their condition?

A. They were both in a state of shock, Mr. Gosnell much worse than Mrs. Gosnell.

Q. After seeing them did you meet the defendant, P. W. Siebrand? A. I did.

Q. Where did you meet him and when?

A. I met him at the circus grounds at Mesa, Arizona, about eight miles from Tempe, the afternoon of Saturday following the accident.

Q. That is the day after the accident?

A. Right.

Q. Where was he when you met him?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

A. He was in a trailer that he used for an office, which was on the grounds at Mesa.

Q. Was there a fair going on there?

A. There was a fair, I think.

Q. At Phoenix? A. At Mesa.

Q. At Mesa?

A. With much of Siebrand's equipment and several trailers there along with other amusements.

Q. Did you announce yourself to Mr. Siebrand when you went into the trailer?

A. Yes, introduced myself and said—

Q. Wait a minute, was there anybody with you?

A. Yes.

Q. Who?

A. P. J. Collins of Fort Dodge, Iowa.

Q. What was your first statement, if any, and Mr. Siebrand's reply when you went into the trailer?

Mr. Breen: Just a minute. If this interrogatory calls for a statement or remarks made by P. W. Siebrand, the same are objected to by the defendants as incompetent and immaterial, and for the specific reason that they are hearsay and made apparently twenty-four hours or more after the alleged accident, and not at the scene of the accident, not part of the accident or the situation surrounding the accident.

The further objection is made that any statements or admissions made by P. W. Siebrand could in no way be binding on Hiko Siebrand or upon S. J. Carroll.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

Q. (By Mr. Burnquist): I asked you what you said and what he said. What did you say to Mr. Siebrand?

The Witness: I introduced myself and after commenting on the weather and the large circus which they had——

Mr. Burnquist: Yes, but——

The Witness (Continuing): ——I said, "I understand you wish to see me."

He said, "I do, and I am so sorry about this accident."

Q. Did you tell him who told you he wanted to see you?

A. I told him Mrs. Gossnell said that he wanted to see me.

Q. What was his reply to that?

Mr. Breen: Same objection as last urged.

Mr. Burnquist: Go ahead.

The Witness: He said that he was so very sorry about the accident and he was going to stand all damages and would buy them a new car at once because theirs was wrecked beyond repair.

Q. What else, if anything, did he say?

Mr. Breen: Same objection as last urged.

The further objection is made, or motion to strike the last preceding answer in that the remarks could in no way be construed as an admission of wrong doing on the part of the defendants or any of them and could in no wise be construed as showing that the defendants or any of them, or anyone acting

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

for them, had been guilty of any wrong doing, misconduct or negligence, either affirmative or non-affirmative.

Mr. Burnquist: Go on, tell the rest of the conversation about what he would do or what he said about the accident.

Mr. Breen: Same objection.

The Witness: We talked about the circus display and he said it was just a winter showing of their show and that they did not start on the summer tour until later in the winter or early spring.

Q. (By Mr. Burnquist): Did he state a fact where he said anything about whether they were moving their equipment or otherwise?

Mr. Breen: Same objection as last urged.

The Witness: He said that this was an early showing of their circus to that extent and he was quite interested that Gossnells had good medical attention.

Q. (By Mr. Burnquist): What did he say about it?

A. He further stated that lawyers shouldn't be brought into the case as they could settle between the Gossnells and himself, as he would stand all damages and lawyers would drag the case through the courts for several years.

Mr. Breen: Move to strike the last answer for all the reasons heretofore urged.

O. (By Mr. Burnquist): What, if anything.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

did he say about the movements of their equipment at the time, as to the distance they were moving it, or whatever?

Mr. Breen: Same objection as last urged.

The Witness: He talked about the equipment being at the Mesa Fair Grounds, was moving it from Phoenix, which is only fifteen miles away.

Q. Mr. Clark, why did you go to see him?

Mr. Breen: Objected to as calling for the opinion and conclusion of the witness; not binding on any of the defendants.

The Witness: At Mrs. Gossnell's request, that Mr. Siebrand told her he wished to see me, inasmuch as I was a friend of theirs.

Q. (By Mr. Burnquist): Did you go for any purpose except to find out about the accident?

A. I went to see him at his request.

Q. Because he asked for it?

A. That is right.

Q. You had sought no interview with him?

A. No.

Q. When you told him Mrs. Gossnell said he wanted you to see him, what did he say?

Mr. Breen: Objected to as leading and suggestive, and the same objection as urged to this line of testimony about attempting to get in an admission as against these other defendants.

The Witness: He repeated several times about how sorry he was about the accident had to happen to the Gossnells with his equipment and that he

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

would stand all damages, and as I said before, buy them a new car at once, assuming that, I suppose—that Mrs. Gossnell could drive.

Mr. Burnquist: I think that is all.

Cross-Examination

By Mr. Breen:

Q. Fred, Fort Dodge is a town of approximately 25,000? A. Yes.

Q. You and Gossnells have both lived here for a good many years?

A. We have lived here going on fifteen years.

Q. And the Gossnells have, as far as you know, lived here always?

A. They were here when we came.

Q. You belong to some of the same clubs?

A. The Country Club.

Q. You have frequently met the Gossnells in Fort Dodge? A. Very often.

Q. And played golf with them at the Country Club? A. A great many times.

Q. Fred, did you visit back and forth in the respective homes? A. Here?

Q. Yes. A. Very occasionally.

Q. Was there any concert between you going to Arizona, at least, with the Gossnells, or to meet them there, or anything of that kind? A. No.

Q. You were out there somewhat for your own health? A. Yes.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

Q. You had seen them and been with them more or less frequently before this accident?

A. We had played golf probably fifteen to twenty times and had dinner on several occasions.

Q. And Fred, were you staying at the same resort or hotel or whatever— A. No.

Q. Different ones? A. Yes.

Q. In what town? A. Tucson.

Q. Where did this accident take place?

A. At Tempe, on the bridge at Tempe.

Q. Tempe is right outside of what?

A. Phoenix, eight miles out of Phoenix.

Q. That was approximately how far from Tucson? A. I believe about 110 miles.

Q. Then you heard of this accident on a Friday night, the latter part of February, 1953?

A. Yes, the same day of the accident.

Q. You were at Tucson when you heard about it?

A. Yes.

Q. They were supposedly in the hospital at Tempe? A. That is right.

Q. So you had quite a drive the next day to see them? A. Yes, I did.

Q. This town where the carnival was, or at least part of it was, was what town, Fred?

A. It was Mesa, M-e-s-a, about eight miles from Tempe.

Q. You saw the Gossnells in the hospital at Tempe? A. Yes.

Q. Sometime Saturday? A. Yes.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

Q. Saturday morning?

A. Saturday morning.

Q. Then you later Saturday afternoon saw Mr. P. W. Siebrand at the carnival grounds or show grounds, or whatever you call it, in Mesa?

A. That is right.

Q. You didn't see anybody else connected with the carnival, or at least talk to them?

A. No, I didn't except for directions to Mr. Siebrand.

Q. You don't know personally how this accident happened?

A. Only by hearsay.

Q. Did Mr. P. W. Siebrand say anything about the details of how the accident happened, any more than he was sorry and he would replace the car, and so on?

A. No, he didn't go into any details of the accident with me.

Q. You don't know from what he said whether he was driving the truck, or who was driving the carnival truck?

A. He said he was not driving.

Q. And how he was going to replace the car, or who was going to replace it, or what he was going to do about damages, or who was going to pay for them, he didn't say?

A. He said he would take care of the damages.

He said, "I will take care of all damages and will replace the car at once."

And if you wish me to say, he further said, "I

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Fred Clark.)

hope we don't get lawyers into the case because it will drag through the courts for several years."

He further said, "I hope they have good medical attention."

Q. Fred, that was the substance of everything that was said?

A. Except we visited about the size of the show, that it was quite large for a small circus.

Q. Did Mr. Collins take any part in the conversation?

A. I believe that he talked very little. He rode up with me.

Q. Mr. P. J. Collins is also a Fort Dodge man?

A. Yes, who was staying in Tucson also at the time.

Q. He is somebody you have known for some-time? A. Yes.

Q. The Gossnells have known for sometime?

A. Right.

Q. Aside from you and Mr. Collins and Mr. P. W. Siebrand, was there anybody else a party to the conversation?

A. No, nobody was in the trailer with us.

Mr. Breen: I think that is all.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

Redirect Examination

By Mr. Burnquist:

Q. You went there because he requested you to go?

A. Yes, when I saw Mrs. Gossnell she said, "Mr. Siebrand wishes to see you."

Q. Did you go there as an emissary of the Gossnells, or what?

A. No, I didn't. He asked Mrs. Gossnell if they had any friends out that way and she said she had this good friend of theirs in Tucson, which was, of course, myself.

Q. You advised Mr. Siebrand of that fact when you introduced yourself?

A. Yes, I did, and I would like further to make the statement that I told Mr. Siebrand if he wished to stand all damages that he should write a letter to them saying so, which he said he would.

Q. He said he would write the Gossnells what he told you?

A. He would write them a letter saying he would stand all damages.

Mr. Breen: Move to strike it.

Mr. Burnquist: That is all.

Mr. Breen: Move to strike the last answer for all the reasons heretofore urged with reference to the inadmissibility of this testimony on the theory of it being an admission against interest, and for

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Fred Clark.)

the further reason that it would appear, at least from the testimony, that Mr. Clark was acting as the representative of the Gossnells, the plaintiffs, and was talking to P. W. Siebrand on their behalf.

That the last testimony offered by the witness pertains to an alleged settlement between the plaintiffs and the defendant, P. W. Siebrand alone, and was never carried out.

(Witness excused.)

Mr. Burnquist: We can agree he doesn't have to sign the notes?

Mr. Breen: That is right.

Mr. Burnquist: It is hereby stipulated and agreed that the signing of the shorthand notes or the signing of the transcript of the testimony be and the same is hereby waived, and that said deposition may be received with the same force and effect as though signed by the witness Fred Clark.

Mr. Breen: That is right.

Certificate

State of Iowa,
County of Webster—

I, Wilma F. Devlin, a certified shorthand reporter, in and for the Eleventh Judicial District of Iowa, of which Webster County is a part, do hereby certify that, pursuant to the notice hereto annexed, there came before me on the 5th day of April, 1954, at 11:45 o'clock a.m., at Suite 414, State Bank Build-

Plaintiff's Exhibit No. 4—(Continued)

ing, Fort Dodge, Iowa, the following named person, to wit: Fred Clark, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath, and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand this 5th day of April, 1954.

/s/ WILMA F. DEVLIN.

Admitted in evidence and Filed April 13, 1954.

Mr. Raineri: I call John Boyd.

JOHN D. BOYD

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Your name is? A. John D. Boyd.

Q. What is your employment, Mr. Boyd?

A. Patrolman, Police Department, City of Tempe.

Q. Are you a member of the police force over in Tempe? A. That is right.

Q. Were you a member of the police force on February 20th, 1953? A. Yes, sir.

Q. Directing your attention to the early morning of February 20th,—not early morning, but to the morning of February 20, 1953, at approximately ten a.m., o'clock, will you tell us where you were at that time?

A. Nine-fifty on the morning of February 20th?

Q. Around ten o'clock, yes.

A. Around ten o'clock in the morning I was going south on the Tempe bridge following a [69] trailer. A pick-up was pulling this trailer, and it was, oh, a two-wheel trailer, and it was rather heavy.

And when it went over the end of the bridge, there was a sort of a rise at the end of the bridge, about oh, seventy-five or one hundred feet beyond there, and it suddenly veered to the left.

(Testimony of John D. Boyd.)

Evidently it came loose from the pick-up, and ran into the side of this car.

Q. And you saw this all happen, is that right?

A. Saw it all happen.

Q. How far were you behind this—you were going in the same direction as the truck and trailer?

A. Same direction, right behind it.

Q. How far behind it were you?

A. About three car lengths.

Q. And there was nothing obstructing your view, or anything? A. Nothing.

Q. You were the first car immediately following that truck and trailer, is that right?

A. That is right.

Q. All right, now, how fast were you travelling at that time?

A. Approximately twenty, twenty-five miles [70] an hour.

Q. Did you observe a car or cars coming from the opposite direction? A. Yes, sir.

Q. Is that a four-lane highway there on that bridge? A. Yes, sir.

Q. Two lanes on each side of the black line?

A. That is right.

Q. What cars did you observe coming from the opposite direction?

A. Well, I observed, I believe it was three cars in line.

Q. Do you know what lane those three cars were in?

(Testimony of John D. Boyd.)

A. They were on the outside lane next to the curbing.

Q. They were, then, in the extreme right lane?

A. Extreme right lane.

Q. Of their right side, then, is that right?

A. That is right.

Q. Now, as you were watching all this, did you observe how far that trailer was from those cars, or any one of those cars, particularly if it hit any of them at the time of the impact, or just previous to the impact? [71]

A. How far it was from them?

Q. Maybe I didn't make myself clear.

How far were those cars, approximately, from that trailer when it began to veer to the left?

A. They were about half the length of the highway, over to the highway, I mean.

Q. What would you say in feet that was?

A. Oh, about twenty feet, fifteen, twenty feet.

Q. And which one of those three cars, if any, was struck? A. The one in the middle.

Q. The one in the center? A. Yes.

Q. Did you determine later whose car that was?

A. Yes, sir.

Q. And whose car was it?

A. Mr. Gossnell.

Q. George F. Gossnell? A. Yes.

Q. And you identified it later through the license? A. That is right.

Q. And inquiries there, is that right?

A. That is right. A complete investigation.

(Testimony of John D. Boyd.)

Q. Now, did you find out who was driving the truck that was pulling the trailer? [72]

A. Yes, sir.

Q. And who was driving that?

A. S. J. Carroll.

Q. Did you determine who owned the truck that he was driving? A. That is right.

Q. Who owned the truck he was driving?

A. Siebrand Brothers Circus and Carnival.

Q. Did you determine who owned the trailer that the truck was pulling?

A. I figured that was right along with the truck, and the pick-up, too.

Q. You didn't check on the exact ownership of the trailer? A. Not at the time, no.

Q. You took it for granted if you checked on the truck, whoever owned the truck owned the trailer, is that right? A. That is right.

Q. Now, did you have any talk there immediately following the accident with the driver of truck?

A. Yes, sir.

Q. Will you tell us generally all of the conversation that was had there relating to the matter, as best you can remember?

A. We generally ask, when we fill out our [72-A] accident report, we just ask them their name, for their driver's license, and where they live, and their occupation, and such as that.

Q. Now, when you asked him what his occupation was——

(Testimony of John D. Boyd.)

Mr. Wilson: I object. Excuse me. No foundation laid.

Mr. Raineri: I will withdraw the question.

Q. (By Mr. Raineri): Did you at that time in connection with the filling out this report, ask the driver of the truck who he was employed by?

Mr. Wilson: I object. The report is the best evidence.

The Court: He may answer.

Mr. Raineri: Will you read the question again?

Mr. Wilson: May I ask him on voir dire?

The Court: You may ask him.

Mr. Raineri: May it please the Court, may I make a statement?

The Court: Oh, no. If he wants to ask a question on voir dire.

Q. (By Mr. Wilson): Do you have the report?

A. What? [73]

Q. Do you have the report you made out at that time? A. No, I don't have the report.

Q. Where is it? A. It is at the station.

Q. You are testifying from your memory now?

A. That is right.

Mr. Wilson: That is all.

The Court: Read the last question that was put to the witness.

(The question was read as follows: "Q. Did you at that time in connection with filling out this report ask the driver of the truck who he was employed by?")

(Testimony of John D. Boyd.)

The Witness: Yes, sir.

Q. (By Mr. Raineri): And what was his answer to that?

A. Siebrand Brothers Circus and Carnival.

Q. Now, did you examine the trailer hitch that was attached to the truck that was pulling the trailer, and examine the hitch that was attached to the trailer itself?

A. In all accidents we do that, examine everything.

Q. And what did you find, or what did your [74] examination of that equipment reveal?

A. I found that there was no safety chain, and there was no lock for the ball hitch at all on the trailer.

Q. Did you observe whether any part of that hitch, either the part on the truck or the part on the trailer, was broken in any way?

A. No, there was not nothing broken. There had never been any lock on it at all.

Q. Now, in that connection, did you issue a citation, or give him a ticket for having unsafe equipment there?

A. Yes, I did.

Q. And did you cite the driver of the truck for that?

A. That is right.

Mr. Raineri: Your witness.

(Testimony of John D. Boyd.)

Cross-Examination

By Mr. Gibbons:

Q. Mr. Boyd, how long had you followed this truck and trailer?

A. Oh, maybe three or four minutes.

Q. Will you tell the jury about what speed it was proceeding at?

A. Twenty, twenty-five miles an hour. [75]

Q. Is that a lawful speed there at that place and time?

A. Yes, sir, it is.

Q. And was the truck and trailer on its proper side of the highway?

A. Yes, sir. It may have been hanging over a little bit on the line, as all drivers do when they cross the bridge. They have a tendency to kind of straddle the line there a little bit, because of fear of hitting the curbing.

Q. Now, there is also a sharp rise there on the bridge as you enter the bridge, isn't there?

A. It is not a sharp rise. Well, it kind of goes up like a little hill, you know.

Q. It amounts to a bump, doesn't it?

A. Not exactly.

Q. Isn't it a fact that is put there for speeders to slow them down as they enter the bridge?

A. Not necessarily.

Q. Just answer my question yes or no.

A. No.

Q. It does give you quite a jolt, though, if you are speeding, doesn't it?

(Testimony of John D. Boyd.)

A. I imagine if you were going fifty, sixty miles an hour, yes.

Q. But you didn't observe anything unusual at [76] all about the driving of this tractor or trailer until you said you saw the trailer come loose from the vehicle that was pulling it?

A. That is right.

Q. What did you do immediately after the trailer came loose and struck the car across from it?

A. Well, I noticed that the car was starting to catch on fire. I had run over and was trying to get the man out, and he was pinned in the car, so I immediately radioed for a fire truck and an ambulance, and then went back to help get the man out.

Q. How long did that take, Mr. Boyd?

A. Oh, a little over five minutes.

Q. And then what did you do after Mr. Gossnell was removed from the automobile?

A. Then we called for a wrecker and started with my investigation.

Q. And with what did you call for a wrecker? You had to return to the police car where you had a radio, is that right?

A. It was radioed in, yes, sir.

Q. Then when you started your investigation, what did you do?

A. Just asked the usual questions when you fill out a report, an accident report. [77]

Q. And that was the time you talked to Mr. Carroll here, is that right?

A. That is right.

Q. That is the first thing you did?

(Testimony of John D. Boyd.)

A. That is right.

Q. And while you were talking to him, you said you filled out a complete accident form, is that right?

A. Yes, sir.

Q. Then what was the next thing you did?

A. I issued a citation to Mr. Carroll.

Q. And what after that?

A. Well, I proceeded to finish my investigation on the paper, and then I went down to the hospital, that is, after all of the accident was cleared up.

Q. Mr. Boyd, didn't you just tell the jury a few minutes ago that you went back and looked at this trailer hitch?

A. Yes. After I went back——

Q. Please answer this question:

Did you do that before or after you talked to Mr. Carroll?

A. Looked at the trailer hitch before we talked to Mr. Carroll?

Q. Yes.

A. State your question again, will you, [78] please?

Q. Mr. Boyd, you have testified that the first thing you did was go over and help extract Mr. Gossnell from the automobile?

A. That is right.

Q. And that the second thing you did was to return to your police car and radio in a report for ambulance, and what else might have been required?

A. Yes, sir.

Q. And that the next thing you did was talk to Mr. Carroll, at which time you filled out an accident

(Testimony of John D. Boyd.)

report, is that right? A. That is right.

Q. Then you said the next thing you did was to give Mr. Carroll a citation, right?

A. That is right.

Q. And earlier in your testimony you said you went back at sometime or other and looked at the trailer hitch. I am just asking you when you did that?

A. That is right. That is why he was issued a citation.

Q. When did you go back and look at it?

A. While we was investigating the accident.

Q. Before or after you gave Mr. Carroll a citation? A. Before. [79]

Q. Before? A. That is right.

Q. You said there were no safety chains there, is that right? A. That is right.

Q. Can you state whether or not the law of this State requires safety chains on such a device?

A. Yes, sir, it does.

Q. Are you sure of that? A. Positive.

Q. Can you give me the statute that requires such safety chain? A. No, sir.

Mr. Mahoney: I object on the ground it is argumentative.

The Court: Yes.

Q. (By Mr. Gibbons): You are sure of that?

A. Positive.

Mr. Mahoney: The objection has been sustained.

The Witness: May I say one more thing?

The Court: No.

(Testimony of John D. Boyd.)

Q. (By Mr. Gibbons): Is that why you gave Mr. Carroll a citation, because there were no safety chains? [80] A. That is right.

Q. Now, will you describe this trailer hitch in more detail to the jury, Mr. Boyd? Do you remember it at all? A. The trailer hitch?

Q. Yes. A. Yes.

Q. Well, describe it briefly to the jury.

A. Well, it was a regular trailer hitch, for a trailer.

Q. Assuming that they know nothing about a trailer hitch, give them some idea what it looks like.

A. We took pictures of it.

Q. Do you have them with you?

A. They are submitted to the Court.

Q. It consisted of a steel ball on one vehicle?

A. That is right.

Q. And a clamp or catch on another?

A. It is supposed to be.

Q. And you said there was nothing broken on there at all? A. Not a thing.

Q. You have testified here before in this matter also, haven't you? A. That is right. [81]

Q. And didn't you previously testify that you went back and looked all over the bridge, and even back on the highway to find the piece that was missing, that was broken off?

A. That was just to check to see if anything had come off of the trailer.

Q. You did testify to that in the previous trial, didn't you? A. Yes, sir.

(Testimony of John D. Boyd.)

Q. As a matter of fact, didn't you say that the catch that should have held the ball had become broken and was off?

A. There was no indication of one being on it at all. That was my testimony.

Q. What was there to hold it, then, Mr. Boyd?

A. That is what I would like to know.

Q. In other words, you don't know what was supposed to hold it?

A. There was supposed to be a chain and a lock on it, but there was nothing on it.

Q. At the time you saw it, there was nothing to hold it at all, was there?

A. That is right.

Mr. Gibbons: That is all.

Q. (By Mr. Wilson): You have your little highway code book with [82] you, and you look into it to see when a law has been violated?

A. No, sir.

Q. You have one, don't you?

A. No.

Q. You just guess at the law?

A. No, I see in our citation books. We have our code numbers.

Q. Have you got it with you?

A. No, sir.

Q. Where is it?

A. It is at the station where it belongs.

Q. Do you know the citation of the law that requires safety chains?

A. No, not offhand, no.

Q. You know perfectly well there is not such a thing, don't you?

(Testimony of John D. Boyd.)

Mr. Mahoney: I object on the ground it is argumentative.

The Court: Yes. Don't argue with him.

Q. (By Mr. Wilson): Now, would you make a picture of this trailer hitch, the part that is on the trailer, on the blackboard? Could you do that for us?

A. I will make a front view of it coming from the trailer. Say this is the trailer here, the [83] front of it. (The witness illustrates on blackboard.)

And this would be the tongue coming out here. And your brace is this way. It has got sort of a cup here that fits over the ball on the pick-up, and this sets right over the ball of the pick-up.

Is that clear enough, sir?

Q. Is that what this one looks like?

A. That is right.

Q. Now, then, show in a different drawing to the side the part that comes on the bottom and holds it on the ball. This is a standard hitch, isn't it?

A. You mean——

Q. The cup sets over the top of the ball. Then——

A. This sets down over the ball.

Q. What goes under it to hold it on there?

A. On top here is supposed to be a lock. It is unscrewed when it sets on the ball, and it closes up and sort of forms a bushing right on the ball on the pick-up.

Then you screw it down and tighten your lock. It is supposed to have a little thing that sets on top there that locks it. When you screw it down tight it will push it up snug. in the [84] ball.

(Testimony of John D. Boyd.)

Q. This hitch had no indication of having any such screw on it?

A. No indication whatsoever of having any lock on at all.

Q. Did you ever hear of one that has a clamp that comes on the bottom?

A. I have never seen one. This had the hole on top here where the thing is supposed to go down through to lock it.

Q. I thought you said it didn't have any indication there was supposed to be one?

Mr. Raineri: No, he didn't say that.

Q. (By Mr. Wilson): Did it have an indication that there was a screw missing out of the top?

A. No indication of the screw ever being in it.

Q. No threads, or anything?

A. No threads or nothing.

Q. Then what is your statement? That there was an indication there was one, that there was a screw on top?

A. That there was a screw on top?

Q. Yes.

A. On all trailer hitches there is a hole here that the thing goes down through. [85]

Q. Including this one?

A. Yes, including this one. There could have been, yes.

Q. There is a hole in this one?

A. It is the same type, yes. And that screws down and locks, and pulls it up onto the ball part of the pick-up.

(Testimony of John D. Boyd.)

Q. There are no trailer hitches with a clamp, a lever that comes from underneath?

A. I have never seen one.

Q. This one had a hole in the top of the ball where the screw came out, in your opinion?

A. That is right.

Q. You would regard it as not being broken? You said it was not broken?

A. I could find no indication of its being broken, no.

Q. It had come apart, in your opinion, I assume? A. I didn't say it came apart.

Q. What did you say about it?

A. I said that there was a place on top here where when that screw is down it comes down flush with that. You can see where there is some indication of it being a lock on it, but there was no indication on it at all. [86]

Q. It hadn't broken off? A. No.

Q. And it hadn't come apart? A. No.

Q. What had broken—or what had become of it?

A. I don't know.

Q. How do you suppose it could get off of there if it didn't break off or come apart?

A. Maybe there was never one on it.

Q. That is what you want to tell the jury?

A. No, not necessarily.

Q. What do you want to tell them?

A. I have tried to explain it to you here; you asked me for an explanation, and I am giving it to you.

(Testimony of John D. Boyd.)

Q. All right. Thank you. Sit down.

Do you recall my asking you before about this record? You do, don't you? A. About what?

Q. About this record you made at that time? Do you recall my asking you about it?

A. The accident report, you mean?

Q. Yes. A. Yes, sir.

Q. And you recall not having had it at that [87] time? A. That is right.

Q. And did you deliberately leave it home this time?

A. Yes, sir; our reports in the office are confidential, sir.

Q. They are confidential?

A. That is right.

Q. And you can testify from them glibly, but they are confidential? A. That is right.

Q. You are testifying from the report now, aren't you?

A. I am testifying just from my report, that is right.

Q. Now, you assumed that the trailer belonged to Mr. Siebrand.

Why didn't you assume that Mr. Carroll was the driver of the truck, and was therefore in the employ of Mr. Siebrand?

A. Why didn't I assume that?

Q. Yes. Why didn't you ask him?

A. We always do that.

Q. But you do always ask about the trailer, who they belong to?

(Testimony of John D. Boyd.)

A. We always ask who they belong to.

Q. You didn't in this case? [88] A. Sure.

Q. You asked him who the trailer belonged to?

A. I asked him who he was employed by.

Q. I asked you, did you ask him who the trailer belonged to? A. No, sir.

Q. You asked that in other cases? A. No.

Q. You never do that? A. No.

Q. You assumed that the trailer belonged to Siebrand? A. That is right.

Q. And you assumed that he was the employee of Siebrand?

A. No, I didn't assume it. He told me that.

Q. He told you that? A. That is right.

Q. Now, why would you ask him such a silly question when he was driving Siebrand's truck?

Mr. Raineri: I will object to the form of that question.

The Court: Yes.

Q. (By Mr. Wilson): Did you ask him if he stole the truck? A. If he stole it? [89]

Q. Yes. A. No.

Q. When you saw that he didn't have a chauffeur's license, which he didn't—that is true, isn't it?

A. That is right.

Q. Did you think he stole the truck?

A. No.

Q. Why not?

A. Well, it just didn't enter my mind, that is all.

Q. Aren't truck drivers supposed to have a chauffeur's license? A. Generally, yes.

(Testimony of John D. Boyd.)

Q. Why didn't you give him a citation for that?

A. If I remember right, I believe he told me he had one, but he didn't have it on his person at that time.

Q. You have got to have them on your person, or you are breaking the law?

A. That is right.

Q. So you gave him the citation for not having the safety chains, but you didn't give him a citation for not having a chauffeur's license?

A. No. I gave him a citation for the unsafe equipment. [90]

Q. You said the safety chains. Do you want to change it? A. Change what?

Q. I wrote it down, that you said the reason you gave him a citation was because he didn't have safety chains.

A. He had unsafe equipment on the highway.

Q. Just a moment. I asked you if you didn't state that you gave him the citation because he didn't have safety chains? Will you answer that yes or no?

A. I don't know what you are talking about, sir.

Mr. Mahoney: Just a minute, please. This is an attempt to confuse this witness. I will challenge the record. In his original statement on direct he said the citation was given for unsafe equipment. Another time he said for safety chains.

Mr. Wilson: Let us read the record.

The Court: Let us not waste any time. Have it

(Testimony of John D. Boyd.)

written up and you can read it to the jury when you argue the case.

Q. (By Mr. Wilson): I will ask you if it is not a fact that you told Mr. Gibbons that the reason you gave him the citation was because he didn't have safety chains? A. Mr. who? [91]

Q. Mr. Gibbons, this man right here.

A. I didn't give him a citation. I gave Mr. Carroll a citation.

Q. You are not trying to be funny, are you?

A. No, sir. That is the way it was.

Q. When Mr. Gibbons was asking you questions a moment ago—— A. That is right.

Q. He asked you why you gave him the citation?

A. Why I gave Mr. Carroll the citation?

Q. Yes. And you told him it was because Mr. Carroll didn't have safety chains on the truck.

A. That is right.

Q. And Mr. Gibbons asked you if you knew of any law requiring him to have the safety chains, and you said you did? A. Yes.

Q. Now, I asked you why you didn't give him a citation for not having a chauffeur's license?

A. Well, being a police officer, I figured maybe one violation was enough.

Q. You often do that, do you?

A. That was beside the fact, though.

Q. And it did not, as you say, excite any interest in your mind whatsoever that he didn't have a chauffeur's license, and he was driving [92] somebody's truck down the street with a trailer?

(Testimony of John D. Boyd.)

A. Right.

Q. Do you know of your own knowledge whether or not Mr. Carroll was an employee of Siebrand?

A. I only know what he told me.

Q. Do you know what disposition was made of that ticket?

A. Yes. A bond was posted and forfeited.

Q. How much? A. Ten dollars.

Mr. Wilson: That is all.

Redirect Examination

By Mr. Raineri:

Mr. Raineri: Mark this as an exhibit here, Plaintiffs' Exhibit 5 for identification.

The Clerk: Plaintiffs' Exhibit 5 for identification.

(Said photograph was marked as Plaintiffs' Exhibit 5 for identification.)

Q. (By Mr. Raineri): Now, Mr. Boyd, did you take any pictures in connection with your investigation of this equipment, or this trailer, at the scene? A. I had some taken.

Q. That day, did you, or later on? [93]

A. That is right, that day.

Q. That same day there at the scene of the accident?

A. Yes, before anything was ever moved.

Q. I show you Plaintiffs' Exhibit 5 for identification, and ask you if that is a picture of the truck

(Testimony of John D. Boyd.)

you took, and the car there, the trailer and the car, rather?

A. That is right, that is the picture.

Q. Now, the purpose of these safety chains is to take care of a situation where in case the hitch breaks in any way, it would prevent the trailer from veering to either side, is that right?

A. That is right.

Mr. Wilson: I object as a conclusion.

Q. (By Mr. Raineri): Your answer was yes, is that right? A. Yes.

Q. Now, did you examine, or were you able to see the inner portion of the trailer?

A. We could see through the hole in the corner.

Q. Did you notice what the contents of this trailer were through this hole in the corner?

Mr. Wilson: I object as improper redirect.

The Court: He may answer.

The Witness: There was rides and [94] concessions, and stuff for a carnival.

Q. (By Mr. Raineri): There was rides equipment? A. Rides equipment.

Q. Now, you testified that this Mr. Carroll didn't explain why he didn't have a lock on the trailer, did he? A. Didn't explain a thing.

Q. Didn't give any explanation, did he?

A. No.

Q. He didn't say why he didn't have it, or try to explain it in any way, did he? A. No.

Q. All right, that is all.

(Testimony of John D. Boyd.)

Mr. Wilson: At this time I ask the Court to instruct the jury that there is no such law.

Mr. Raineri: There certainly is such a law.

The Court: I couldn't find it sometime ago.

Mr. Raineri: There is a statute that says you can't put——

Mr. Mahoney: I don't think that should be argued in front of the jury.

The Court: No. The Court will instruct the jury at the proper time.

Mr. Gibbons: May I ask one other question, your Honor, of the witness? [95]

The Court: Yes.

Recross-Examination

By Mr. Gibbons:

Q. Did you ask Mr. Carroll what kind of a hitch he had on there? A. Did I ask him?

Q. Yes. A. No.

Q. You didn't even ask him? A. No, sir.

Q. You didn't ask him whether he had safety chains on or not, did you?

A. I didn't have to ask him. I could see they weren't on.

Q. As a matter of fact, you didn't discuss the hitch with Mr. Carroll at all, did you?

A. When I wrote the citation, yes.

Q. Well, what did you ask him, if anything?

A. I told him he didn't have the proper equipment for pulling a trailer on a highway.

(Testimony of John D. Boyd.)

Q. Did you ask him any questions about it at all?

A. Only that I told him what he was supposed to have on it, why I was giving him the citation.

Q. As a matter of fact—— [96]

Mr. Raineri: You told him why you were giving the citation?

The Witness: That is right.

Q. (By Mr. Gibbons): As a matter of fact, didn't he tell you after he looked at it that something had broken off?

A. I don't remember him saying that, no, sir.

Q. You can't remember, is that right?

A. Yes, sir.

Q. You can't remember if he showed you what it was that was broken off?

A. No. He didn't show me anything.

Mr. Gibbons: That is all.

Mr. Raineri: That is all.

(Witness excused.) [97]

Mr. Raineri: I call Dr. Pohle, your Honor.

ERNEST E. VON POHLE

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Doctor, will you please state your full name?

A. Ernest E. Von Pohle.

(Testimony of Ernest E. Von Pohle.)

Q. And you are a duly licensed practicing physician for the state of Arizona, is that right?

A. Yes, sir.

Q. How long, Doctor, have you been engaged in the practice of your profession?

A. Since 1936.

Q. And where have you practiced, Doctor, all of those years?

A. Mostly in Arizona. Also in New Mexico, and some in California.

Q. Now, what medical schools did you attend?

A. I attended the College of Medical Evangelists in Loma-Linda and Los Angeles, California.

Q. And what degrees do you hold, what medical degrees? A. Doctor of Medicine. [98]

Q. Have you made any studies along the medical field since you graduated from medical school?

A. I go frequently to conventions and special meetings they have in different sections of the country.

Q. Now, Doctor, do you know one George Gossnell? A. Yes, sir.

Q. And do you know one Estella Gossnell, his wife? A. Yes, sir.

Q. Will you tell the court and jury when you first had occasion, or under what circumstances you first met the Gossnells?

A. We first met them in Tempe Clinic Hospital, I believe it was the 20th of February in 1953.

Q. Now, Doctor, I omitted to ask you, do you practice medicine in Tempe, Arizona?

(Testimony of Ernest E. Von Pohle.)

A. Yes, I do.

Q. And you have your office there?

A. 25 West 8th Street.

Q. And you also have a hospital there, do you?

A. Yes, sir.

Q. And did you see these people, the Gossnells, in your hospital? Were you called to attend them there? A. That is right. [99]

Q. Now, just tell the court and jury what condition—first, directing your attention to Mr. Gosnell, what condition you found him to be in, and what your findings were at that time, using your notes, if you wish, to refresh your memory?

A. Mr. Gosnell was in a rather critical condition upon his admission. He was badly injured in several portions of the body. He had a deep laceration over the left eye on the forehead, about eight centimeters, that is, three inches long.

The bone under the arch there was cracked. There were several cuts on his upper eyelid. There was an abrasion on the forehead, on the left side of the nose. There was a longitudinal deep cut on his upper and lower lips.

There were cuts around the mouth. Two deep lacerations on the left elbow, about two to three inches long. Several blood clots on the left side of the chest, that is, under the skin. There was a contusion of the fifth rib on the chest side, on the left side.

A fracture of the fifth and the eighth ribs. A hematoma or a blood clot on the surface of the

(Testimony of Ernest E. Von Pohle.)

right hand and on the back of the hand. There are two lacerations on the second finger of the right hand.

There was a compound fracture of the femur.

Q. Now, pardon me there, Doctor. What do [100] we mean when we say a compound fracture of the femur? Will you indicate on yourself what it is, and explain what you mean by "compound"?

A. In a compound fracture the bones protrude out through the flesh. Besides being broken, they break the skin all the way out, and the bones protrude out through the flesh. There is a connection between the outside and the fractures, and this was about the upper third of the femur.

Q. Of the left leg?

A. On the left leg, yes.

Q. You could see the bone protruding right through? A. You could see the bone there.

Q. One more question.

A. I have a few more——

Q. Pardon me for interrupting you. I just want to ask this one question on this point. Is the femur the largest bone in the body? A. I think so.

Q. All right.

A. It is the longest bone, at least. There was a laceration on the skin over the site of the fracture about four centimeters long. There was a comminuted fracture of the femur just above the knee. By comminuted we mean it had broken in several parts. [101]

(Testimony of Ernest E. Von Pohle.)

Q. Do I understand you to mean the femur was broken in two different places?

A. It was probably broken in ten different places, where it was broken down just above the knee, and then the fracture went down into the knee joint. There were several fractures that went down into the knee joint.

Q. That is other than the fracture you just described before? A. Besides the one above, yes.

Q. All right.

A. Then there were many abrasions to the left knee. There was a large deep abrasion on the anterior surface of the left leg, and a fracture of the fibula, which is the side bone. There are two bones in the lower leg, and the lateral one was also broken. There was an abrasion of the exterior and interior aspect of the left ankle.

Q. Did I understand you to say, Doctor, that there were two fractures in the fibula?

A. One fracture in the fibula.

Q. I didn't understand, then. Did you say something about the ankle?

A. There were abrasions, cuts, and bruises around the ankle.

Q. Now, was Mr. Gosnell conscious or [102] unconscious when you first saw him?

A. He was conscious.

Q. And what treatment did you give him at that time?

A. We were treating him—first of all, we try to stop the bleeding and make the patient comfort-

(Testimony of Ernest E. Von Pohle.)

able, and then we have X-rays taken, and evaluate the total of the injuries, and then institute the treatment which we think is the best for him, which we considered for him to be traction.

Q. Now, the X-rays that you speak of, do you have those X-rays with you?

A. I am sorry, I don't. I think they are in custody of the court here.

Q. Are you able to identify those X-rays?

A. I think so.

Mr. Raineri: I will have that marked Plaintiff's Exhibit 6 for identification. And this as Exhibit 7.

The Clerk: Plaintiffs' Exhibits 6 and 7 for identification.

(Said X-rays were marked as Plaintiffs' Exhibits 6 and 7, respectively, for identification.)

Q. (By Mr. Raineri): I show you Plaintiffs' Exhibits 6 and 7, which [103] are X-rays, and using this shadow box, are you able to demonstrate to the jury the fractures you talked about here, from these X-rays?

A. Sure. This view demonstrates a fracture here of the upper third of the left thigh bone, and down here it shows a transverse fracture. (Indicating.) Here is a fracture that is overriding about a half an inch there. Then there is a fracture across here.

Q. Are you speaking now, Doctor, of the femur?

A. That is the left femur, yes, sir.

Q. That is the bone between the knee and the hip, is that right?

(Testimony of Ernest E. Von Pohle.)

A. That is right. There is another view of the same one, showing the proximal part, or the part closest to the body, which is pointing frontwards, and the other one is behind that. That is a side view one taken across this way.

The other one is one taken of the front view of it.

This shows while he was in traction it had been stretched out in order to let it back in to a correct position and alignment. This also shows a fracture at the site of the knee.

This shows some of the longitudinal fractures there. We will have some other ones here that [104] show the knee more in detail. Most of these with these iron rods on here show the progress of the treatment, so we will skip over them.

This is a picture of the chest. Right at this site here is the fifth rib. There is 1. 2, 3, 4, 5. As we see the fifth rib around right here we notice a fracture right as it goes around.

I don't see the fracture of the eighth one in that picture. This shows a little better the knee, a side picture of the knee.

See, here is a fracture in the upper third, and this is down just above the knee. You can see the fracture across there, and some of the separation of the fragments. This also shows more detail of the knee, the side view.

This shows a front view of the knee, a separation of the fragments. This also shows some of the fractures in the knee and the upper third.

Q. To save time, Doctor, do practically all the

(Testimony of Ernest E. Von Pohle.)

rest of those X-rays show some of the things you have already shown?

A. Most of those are duplicates that were taken as we continued with him.

Q. I show you Plaintiffs' Exhibit 7 marked for identification, and ask you what that is, if you know? [105]

A. These are the X-rays of Estella Gossnell.

Q. What, if anything, do they show?

A. I don't believe they show any actual—any broken bones. Yes. I take that back. She had some broken ribs, too.

Q. Are you able to demonstrate that?

A. Just a minute. I want to look up the record on that and see just where they are. We can point them out a little easier that way.

I don't recall right now whether we could ever demonstrate those broken ribs in X-ray.

Mr. Gibbons: Doctor, we can't hear you or see the picture, either one.

The Witness: Just a minute. I want to see it myself, and then I will stand aside, Mr. Gibbons. Sometimes it is hard to show pictures of the ribs that demonstrate fractures.

Q. (By Mr. Raineri): How do you determine that, then, Doctor?

A. Well, many times we take pictures of different views, and sometimes we never do demonstrate them in the X-ray, but later on if healing takes place, we feel a lump, and callous which forms at

(Testimony of Ernest E. Von Pohle.)

the site of the break stands up just like a little marble there.

Q. What was the situation in this case? [106]

A. I think Mrs. Gosnell had two broken ribs, as I recall.

Mr. Raineri: May this be marked for identification?

The Clerk: Plaintiffs' Exhibit 8 for identification.

(Said X-rays were marked Plaintiffs' Exhibit 8 for identification.)

Q. (By Mr. Raineri): I show you Plaintiffs' Exhibit 8 marked for identification, and ask you if you know what that is?

A. These are pictures taken at the Grunow Memorial Clinic which are similar to the ones we took, only at a later date, which shows a fracture of the femur, and also some displacement of the femur down by the knee.

Mr. Gibbons: For the purposes of the record, he is testifying from X-rays which he says himself he didn't take. They were taken at the Grunow Memorial Clinic.

Mr. Raineri: Subject to further connection. We will connect it up.

Mr. Gibbons: If they will be later connected, I won't object.

The Court: All right, go ahead.

Mr. Raineri: I will connect it up. [107]

The Witness: There isn't complete healing on

(Testimony of Ernest E. Von Pohle.)

here. The position, the alignment is fairly good, but there is still no complete healing at the site of the fracture in the upper third of the femur. The knee appears to be fairly well healed.

Mr. Raineri: We will offer at this time all of the X-rays, with the exception of those taken—that is, we will offer Plaintiffs' Exhibits 6 and 7. We won't offer 8, because we will connect that up later.

The Court: All right.

The Clerk: Plaintiffs' Exhibits 6 and 7 in evidence.

(Said X-rays were received in evidence and marked Plaintiffs' Exhibits 6 and 7.)

Mr. Raineri: This has been offered in evidence.

Mr. Gibbons: Wait a minute. The officer testified he didn't take that picture. He said he had it taken.

Mr. Raineri: He said he took it on the scene.

Mr. Gibbons: He said he had it taken.

Mr. Raineri: I understood that he took it. I maybe didn't hear right.

The Court: He didn't. Find out who took it and bring him in here.

Mr. Gibbons: May it be withdrawn from the jury, [108] if your Honor please?

The Court: Yes.

Q. (By Mr. Raineri): Now, Doctor, it has been testified here by the Gossnells that they have expended down to the present date, or they show.

(Testimony of Ernest E. Von Pohle.)

rather, down to the present date, not that they have expended, but they have expended part and owe in part a sum of \$12,027.00 for medical expenses.

Based on the charges you made at your hospital there at Tempe for the treatment you rendered, and breaking these down as follows: Nurses, \$3,888.00. Fort Dodge Hospital, \$2,900.00.

Dr. Hartman, \$75.00. Dr. Knowles, \$960.00. Dr. Dawson, \$350.00. Medicine, \$85.00.

Would you say those were reasonable and necessary disbursements in a case of this kind?

Mr. Gibbons: May I ask a question on voir dire?

The Court: Go ahead.

Q. (By Mr. Gibbons): Doctor, are you familiar with the hospital charges at Fort Dodge, Iowa?

A. No, I am not.

The Court: They are high every place you go.

Mr. Gibbons: I don't think the witness is qualified to answer that question. [109]

The Court: Go ahead.

Mr. Raineri: Answer the question.

The Witness: I think that is a reasonable charge.

Q. (By Mr. Raineri): Now, Doctor, based on your examination of Mr. Gosnell, how long did you continue to treat him at your hospital?

A. We treated him for slightly over two months.

Q. And based on your observation of him during that period of three months——

A. Two months.

Q. Or two months, excuse me. And based on

(Testimony of Ernest E. Von Pohle.)

your knowledge of the fracture or fractures that he sustained, especially to the femur, could his disability well run down to the present date?

A. Yes, it could.

Q. And would you have any opinion as to how long that man will be bedridden such as he is today, to a reasonable degree of medical certainty?

A. I don't know if I can put it down to a reasonable degree of certainty, but he might have a——

Mr. Wilson: I object to it unless he can say——

The Court: All right.

Q. (By Mr. Raineri): Well, can you give an opinion as a medical [110] man, as a doctor, on that? A. He might have a permanent——

Mr. Wilson: Just a moment. I object as not responsive.

The Court: He might have a lot of things.

Q. (By Mr. Raineri): Do you have an opinion?

A. He might have a permanent disability. He might have a non-union.

Mr. Wilson: I object to that as not responsive.

Q. (By Mr. Raineri): Do you have an opinion to a reasonable degree of medical certainty as to whether or not this man will suffer permanent residuals as a result of these injuries he sustained?

A. I think he will, yes.

Q. Now, will that be for the rest of his lifetime?

A. Yes, sir.

Mr. Raineri: That is all.

(Testimony of Ernest E. Von Pohle.)

Cross-Examination

By Mr. Wilson:

Q. Doctor, you just came into the courtroom before you went on the stand, didn't you?

A. No, I was here a few minutes before.

Q. Did Mr. Gossnell have a broken ankle? [11]

A. I don't think so.

Q. You have got your records there. You could look it up, couldn't you?

A. We didn't have him down for a broken ankle, no.

Q. Would you have known in two months at your hospital whether or not he had a broken ankle?

A. Yes.

Q. And you would say he didn't have a broken ankle?

A. That is right.

Q. Is he under your care now?

A. No, he is not.

Q. How long since he has been under your care?

A. Since the 25th of April of 1953.

Q. And did you have him up when he was with you under your care?

A. No.

Q. Do you know why he is horizontal at the present time, from a treatment standpoint?

A. Well, I couldn't say with certainty. I haven't examined him. I haven't taken X-rays of him, and so from the certainty of my own knowledge, I couldn't say.

Q. Does a man of his age, does his metabolism work better, and the calcium form better in the

(Testimony of Ernest E. Von Pohle.)

bones [112] when he is on crutches, or sitting up, or in a wheelchair?

A. Yes, the more motion they have, the better metabolism they have.

Q. Now, you are well acquainted with his injuries, are you not?

A. Well acquainted with——

Q. His injuries? A. Oh, yes, sure.

Q. To your knowledge, he sustained no injuries other than the ones you treated for two months?

A. That is right.

Q. Do you know of any reason that he shouldn't be in a wheelchair or on crutches at the present time, to your knowledge?

A. Well, I just mentioned that I haven't examined him for a year, so I shouldn't pass an opinion, or I don't know.

Q. I say, do you know of any reason he shouldn't be in a wheelchair or on crutches, or in an up and down position at the present time?

A. No, I don't know now.

Q. If he could be put in that position, would he be better off as far as healing is concerned?

Mr. Raineri: I will object to that question, your Honor, because that is assuming that he could [113] be placed in that position. There is no showing here that he can be.

The Court: He may answer if he has an opinion.

Mr. Raineri: If he didn't examine him, he couldn't say.

The Witness: That is right. I didn't examine

(Testimony of Ernest E. Von Pohle.)

him, so I am in no position to assume anything about him now.

Q. (By Mr. Wilson): I don't ask you to assume anything, Doctor, at all. Do you know, from his injury, of any reason why a cast can't be put upon him that would allow him to be in a wheelchair or on crutches?

A. I don't know what his condition is at the present time.

Q. You know what his condition was, do you not?

A. Sure, I know what his condition was. At that time he could not, when I last saw him, he could not have been up on crutches or in a wheelchair.

Q. Why? Why?

A. There were several reasons. When there is a broken bone, there is often what we call a fat embolism. A little globule of fat will get into a vein and will go to a lung and cause an embolism, or it will cause a large clot in the lungs, which he happened to have a couple of while he was there. And [114] to have gotten him up and move him around would have probably, if he had had another one, would have been fatal.

Q. Did you expect him to have lung trouble from being down on his back after an accident of this sort?

A. We expect any fractured bone to have——

Q. Did you expect him to have pneumonia?

A. We expect any person we know that has any

(Testimony of Ernest E. Von Pohle.)

fractured bone, even though it be a little finger, you can get a fatty embolism which might cause immediate death.

Q. So you want this jury to believe that you put all of your people with broken bones, even if it is a little finger, in bed for a year or fourteen months, for fear of a fatty embolism, is that correct?

A. We immobilize that so there won't be that danger of a fatty embolism.

Q. So you put a cast on the little finger. Then if a man walks around, or sits up, or can walk on crutches, he forms calcium quicker, and the thing heals quicker, isn't that right?

A. That is right.

Mr. Wilson: That is all. [115]

Redirect Examination

By Mr. Raineri:

Q. Now, Doctor, based on your examination of these two X-rays, Plaintiffs' Exhibit 8, would that show that man, would it appear from those X-rays that a man in the condition that is revealed by those X-rays would be bedridden, or could be bedridden from that condition?

A. Yes. I see no reason why he shouldn't be, because there isn't enough callous for that femur to bear weight at the present time.

Mr. Raineri: That is all.

(Testimony of Ernest E. Von Pohle.)

Recross-Examination

By Mr. Gibbons:

Q. Doctor, you first treated this broken leg sustained by Mr. Gossnell with traction, is that right?

A. Yes, sir.

Q. That is a matter of suspending and placing certain weights or pressures against the leg to hold it in position, is that right?

A. That is right. And also to pull out the fragments that are overlapped.

Q. In that manner you were able to get the bone back together? A. We got it in position.

Q. In position to heal? [116]

A. That is right.

Q. Did you later apply a cast to the leg?

A. We applied a cast just before he went to Fort Dodge.

Q. Will you explain to the jury why that cast was applied?

A. The cast was applied so that he could be moved.

Q. Well, isn't that the usual final treatment for a broken leg, to put it in a cast?

A. There is several different methods of treating broken legs, depending on the circumstances of each individual case.

Q. That is one of the usual treatments, isn't it, Doctor? A. Sure, that is one of them.

Q. That is widely used in this area, at least,

(Testimony of Ernest E. Von Pohle.)

isn't it, to your knowledge? A. Yes.

Q. Isn't that the treatment you used?

A. Yes, we use that. No, we used traction. We didn't put him in a cast until he was ready to be moved.

Q. In other cases, don't you use a cast?

A. Sometimes yes, sometimes no.

Q. You saw this cast that was applied to [117] Mr. Gossnell's leg, isn't that right? A. Yes.

Q. And at least one usual form of treatment is that cast to have remained on that leg until the leg was healed, isn't that true?

A. That is right.

Q. And it could have remained there until his leg was well, right? As far as you know?

A. Well, it is hard to definitely determine whether it is completely healed after we remove the cast, and we have to take more X-rays.

Q. Doctor, I just asked you, it is usual in your practice, or at least the local practice here, to leave that cast on until the leg is well, or you think it is well, isn't that right?

Mr. Raineri: I object as asked and answered.

Mr. Gibbons: He has not answered.

The Court: Answer it again.

The Witness: Yes, we usually leave it on, or else remove it and put another one on a little tighter.

Q. (By Mr. Gibbons): Now, was Mr. Gossnell in condition to be on crutches at the time you last saw him here in Phoenix and before he left for Fort Dodge? A. No. [118]

(Testimony of Ernest E. Von Pohle.)

Q. He was not? A. No.

Q. Do you know what treatment he received after he went back to Fort Dodge? A. No.

Mr. Gibbons: That is all.

Redirect Examination

By Mr. Raineri:

Q. One more question. When you speak of the fibula, what part of the leg do you speak of?

A. In the leg, the lower leg, from the knee to the ankle, there is two bones; the tibia is the large shin bone, and the fibula is the small one on the outside.

Q. Where was the fibula fractured in this case?

A. Just above this ankle bone there, just above there. (Indicating.)

Mr. Raineri: All right, that is all.

The Court: That appears to be all, Doctor.

(Witness excused.)

Mr. Mahoney: Your Honor, could we suspend at this time? We have a couple more witnesses, but they are not available until tomorrow morning.

The Court: All right. We will have to suspend until eleven o'clock. [119]

Mr. Wilson: May I ask counsel if they will stipulate to the examination of Mr. Gossnell at a time that is convenient to them today or tomorrow, by a Dr. Bishop?

The Court: All right.

Mr. Mahoney: Surely, we will stipulate.

The Court: Report back at 11 o'clock tomorrow, please.

Keep in mind the court's admonition.

(Thereupon at four o'clock p.m. an adjournment was taken to 11 o'clock a.m. the following day, Wednesday, April 14, 1954.) [120]

Wednesday, April 14, 1954—11:00 A.M.

The Court: Call your next witness.

Mr. Mahoney: Dr. Hartman.

STANFORD F. HARTMAN

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mahoney:

Q. Will you state your name, please?

A. Stanford F. Hartman.

Q. Your occupation?

A. I am an orthopedic surgeon. [121]

Q. How long have you been an orthopedic surgeon, Dr. Hartman?

A. Approximately ten years.

Q. What is your educational background in that regard?

A. I graduated from the University of Tulane in New Orleans.

Q. That was your general medical degree?

A. That is right.

(Testimony of Stanford F. Hartman.)

Q. Tulane. And did you have any special training in orthopedics, Doctor?

A. For the past ten years, yes, sir.

Q. Now, Dr. Hartman, did you examine George Gossnell, one of the plaintiffs in this case?

A. I did, sir.

Q. And I believe you have a report there in your hands, have you not? A. I do.

Q. Do you want to refer to that in your testimony? A. If I may.

Q. When did you first see Mr. Gossnell, Dr. Hartman?

A. According to my records, sir, I saw him on February 26, 1953.

Q. Where did you see him? [122]

A. At the Tempe Hospital.

Q. What did you observe at that time with regard to his physical condition?

A. He had been in a recent accident, according to the records, which was on February 20, 1953. And he had many fractures, a considerable amount of lacerations and contusions, and so forth, and if I may read them, I will.

Q. Yes.

A. And I will explain the nomenclature.

A simple fracture of the left fibula, mid third. Simple means it was not through the skin, or the skin was not broken. And the fibula is the small bone in the leg, on the outer side. And mid third, it would be approximately right there (indicating).

There was a simple fracture of the fifth rib. There

(Testimony of Stanford F. Hartman.)

was a simple comminuted fracture of the left kneecap.

Comminuted in that case means more than one fracture, more than one piece in the kneecap.

Multiple lacerations of the forehead and upper eyelid, left elbow, right mid finger, and left thigh, laterally, right here on the lateral side of the thigh. Left knee anteriorly. Abrasion over the left leg and ankle.

And there was a simple comminuted fracture [123] around this region here, the orbit on the left. And a fracture in the lower femur, that is the big bone here in the thigh above the knee joint. A compound comminuted fracture. In other words, there was an opening in the skin over the—the opening being here, and the fracture was in the mid and upper third of the left femur, which, as I say, is the thigh bone.

That is it, sir.

Q. The chief fracture, of course, was the fracture to the left femur, was it not?

A. That is right.

Q. How many times did you visit the patient there at the hospital?

A. I think I saw him three times.

Q. And did you prescribe any course of treatment at that time?

A. Yes, I did. I helped line up balanced traction, and each time I visited him would help Dr. Pohle change the alignment, and so forth, as we thought it should be.

(Testimony of Stanford F. Hartman.)

Q. Now, Dr. Hartman, did you advise an operation, or anything of that nature, at that time, a reduction?

A. At that time the only possible type of treatment advised was a traction. There are several [124] kinds of traction. One is skeletal, meaning through the bone, and the other is on the skin. Therefore, a skeletal traction was put through the tibia, that is, the big bone in the leg, and he was lined up in balanced traction, so that he could be taken care of, his different duties, and so forth, while in this balanced traction, so he could raise up and down and be cleaned, and have the usual type of treatment that a bed patient requires.

It was thought, however, at the time when first seen that an attempt to operate on his femur, or to do an open reduction, was out of the question because of the abrasion and laceration over the fracture site. I was worried to make a recommendation of that, because of possibility of an infection setting up in this bone, and this happens to be the biggest bone in the body, so it was thought he should have conservative therapy until it was healed, and then perhaps have an open reduction.

Q. Now, Doctor, the evidence shows that a month or so thereafter he went back to Iowa. Mr. Gossnell?

A. Yes.

Q. And when was the last time that you saw him?

A. According to my records, sir, it was on March the 1st.

Q. Of this year? [125]

A. Yes, sir.

(Testimony of Stanford F. Hartman.)

Q. And where did you see him, Doctor?

A. Here at the hospital, where X-rays were taken and examinations made.

Q. At the Good Samaritan Hospital?

A. Yes. And X-rays were taken, and an examination——

Q. Did you have X-rays taken of him at that examination, Dr. Hartman? A. I did, sir.

Q. They were taken at your direction, were they not? A. That is right.

Q. I show you Plaintiffs' Exhibit 8 for identification, and ask you if you can identify the contents?

A. All right, sir. I would like to change that. I didn't take them at Good Samaritan, sir. I meant at the Grunow Clinic.

Q. All right, fine. You recognize those films, Doctor? A. Yes, I do, sir.

Q. And they are films of what, or of whom?

A. Of the patient, Mr. Gossnell, and of the left femur and the left shoulder.

Mr. Mahoney: We offer those in evidence, your Honor. [126]

Mr. Wilson: When were they taken, Doctor?

The Witness: 3/1/54.

The Court: Any objection?

Mr. Wilson: No objection.

Mr. Gibbons: No objection.

Q. (By Mr. Mahoney): Now, Doctor, let me ask you this: What did your examination on March

(Testimony of Stanford F. Hartman.)

1st of this year consist of? You mentioned these X-rays?

A. Yes, sir. Well, it was impossible to examine under the cast, as the man was in a body spica. However, I did examine the position of the—the angle of the knee and the foot in the spica, the left elbow, the previous laceration area over the left eye, the left upper extremity, the elbow, and the fingers, and so forth.

And his hands. And if you remember, I mentioned he had an injury to his right mid finger, and that was examined.

In other words, the points of interest that had been mentioned previously in his accident were examined.

Q. I see. Now, would you step down to the view box here and interpret those X-rays, please?

The Clerk: Plaintiffs' Exhibit No. 8 in [127] evidence.

(Said X-rays were received in evidence and marked Plaintiffs' Exhibit 8.)

Q. (By Mr. Mahoney): Now, these are the X-rays taken under your direction March 1st of 1954, is that right? A. That is right, sir.

Now, this view box shows two pictures. The one here on my left, the furthest over, is an AP view, and that means it is looking at it right straight this way. In other words, AP. And this view here is a lateral view, taken from the side, in other words, to show two different planes.

(Testimony of Stanford F. Hartman.)

Also, one can see a fracture in this area, or evidence of a fracture. And also in this area. (Indicating.) And also you see evidence of a fracture in the lower end of the femur, which I mentioned previously, and one on this lateral view.

The patella does show, but it is difficult, however, to show it from this distance, of any change in there, but with the previous films it could.

Now, interpreting this X-ray through the cast, first of all, we must think of position. Well, the angle here I think is very good, as far as alignment is concerned. This fracture I think is well aligned, and this is, too.

Nature is very kind to us in throwing down [128] callous, and I think from the AP it looks very good.

From the lateral, however, one can see that the general alignment is fine, but there is a little anterior displacement of the upper fragment, as you can see.

Now, in interpreting healing here, we could say there is a healing fracture, but to me it doesn't show solid union; in other words, a sufficient amount of healing that the cast could be removed, so this man can get up and get around, and walk sufficiently, and return to activity.

The fracture below does—I feel in this length of time he should be able to bear weight on here, considering like fractures of this nature in the histories, and so forth.

Now, this is the one question that bothered us a great deal. As I mentioned, there was a laceration

(Testimony of Stanford F. Hartman.)

over the lateral side, and it was thought it was compound, in other words, continuity between the outside and the bone, rather than the simple, where the skin is not broken.

It was thought that an internal fixation would be the one to follow; however, because of the laceration I mentioned before, we didn't think so. So we tried traction, and as you can see, the alignment has been held very well. [129]

But it has entailed a man being in bed and non-active, and so forth, in this position. If an open reduction had been carried out, I feel he would have been able to get up and get around by this time. But again we were unable to do it because of the type of injury presented at the time I first saw him.

Of course, these pictures are taken through the cast. A picture also was taken of the left shoulder, because the patient did complain of some limitation in the motions of the shoulder, passively and actively. It shows some lack of use, in other words, some decalcification, which is present when an extremity isn't used, or a bone isn't used.

However, it doesn't show any fracture site in this area. It does show some roughening on the upper end. However, I don't think this is evidence of any fracture.

Another view taken of the same shoulder, with rotation, shows the same decalcification, but no evidence of any fracture.

Q. You say that comes from inactivity?

A. That is right, sir.

(Testimony of Stanford F. Hartman.)

Q. Now, Doctor, you testified that the degree of healing has not reached a point where weight can be placed on this limb, is that correct?

A. That is my feeling, sir. [130]

Q. It is in evidence here that very substantial medical expense has been incurred during the last 14 months. Could you tell us whether or not there will be a substantial medical expense in the future for this leg for Mr. Gossnell?

A. I think in any type of treatment that one would venture to follow in the future here will entail quite a bit of medical expense, yes.

Q. Could you state as a medical opinion, Doctor, whether or not this man will probably be permanently disabled by this injury?

A. Yes, I think he will have some permanent disability, yes.

Q. It is in evidence, Doctor, that his occupation was that of salesman, and that he was involved in getting in and out of a car, and doing the usual things that a salesman would do.

Would it be your opinion that his ability to earn his living in that fashion will be permanently impaired in the future?

A. I would like to answer that this way, sir.

Here is a man certainly past the growing state. In other words, he is not in his early teens, or thirties, or forties, and as we know, he did suffer severe injuries.

His treatment has been that of traction and [131]

(Testimony of Stanford F. Hartman.)

immobilization, the traction which was carried out here, and immobilization, which you can see, in the cast, which is inactivity.

From past experience, we know that any person who has one joint, or many joints immobilized, or kept still for a period of time, have a tendency to have limitation in motion. And I would expect him not to be any different from anybody else, even whether he had had any injuries, I mean, any fractures of the bone or not.

Q. Doctor, in your opinion, how long will Mr. Gossnell be laid up in bed like this in the future?

A. That is determined exactly on the type of treatment he has. If the present treatment, immobilization, is carried out, it will be for many months; first, in the cast, and until sufficient amount of callous permits to remove the cast. It may be necessary then to even apply a long leg brace, so he will be able to get walking and get some motion in his knees.

Now, if the method of treatment would be that of internal fixation, requiring a pin down through the femur, that would cut down the period of time, but it would mean an operation. And here is another thing that would have to be considered, would be the history that he does have of a blood clot, or occlusion, [132] which occurred while he was at Tempe Hospital. So one would have to weigh the two types of treatment, and talk to the patient as to which he would rather have. I feel if an opera-

(Testimony of Stanford F. Hartman.)

tive procedure was carried out, his time of immobilization and morbidity would be reduced.

Q. Could you limit that? Would it be many months, or could you pin that down?

A. Yes. If the present treatment is carried out, it will be, according to the films I took on March 1st, 1954, it may be four to seven or eight months in the cast. We may be able to bring it down. It is according to recheck X-rays, according to the amount of callous laid down. Nobody would take it off until sufficient callous, in his own mind, was there because he wouldn't want it angled and wouldn't want to lose the position he has.

Then, of course, physiotherapy would be necessary to start moving these joints, and after immobilization of this type, we do get swelling, and he may present a good deal of swelling, and some circulatory discomfort, and so forth. I mean redness, and so on, probably from the period of immobilization.

Now, to that part, before he would be up and around, getting back to activity that he would like to carry out, I imagine it would be a year to a [133] year and a half.

Mr. Mahoney: Take the witness.

Cross-Examination

By Mr. Wilson:

Q. Doctor, could you state the percentage of permanent injury that you estimated?

A. That is rather hard to do, sir. At this time I feel that he is too early to rate.

(Testimony of Stanford F. Hartman.)

Q. Is that not a common thing to do, to estimate the percentage of permanent disability?

A. I usually always try to, yes, sir.

Q. You don't think it will be 100 per cent permanent disability? A. Oh, no.

Q. You think it will be 10 per cent?

A. I would rather not say. It would be very difficult to tell until at least after the cast was removed, and see how these joints move, and see how the circulatory system comes back, and so forth. I think it is a little bit too early.

Q. You were called in as a specialist consultant to Dr. Pohle? A. That is right, sir.

Q. And you put the cast on him, or the cast was put on——

A. I didn't put the cast on, sir. [134]

Q. I didn't mean this one. I mean the one when he went to Iowa.

A. No, I didn't put that on, sir.

Q. You recommended putting it on?

A. Yes, sir.

Q. That is one time you saw him, practically the time he left for Iowa?

A. I saw him before he left.

Q. And you had seen him before that?

A. Yes.

Q. Did you say three times?

A. I think three times.

Q. And you know that he had a Knowles bridge put on after he went to Iowa?

(Testimony of Stanford F. Hartman.)

A. I had a record that he had been treated by Dr. Knowles, yes, sir.

Q. With a Knowles bridge?

A. That is what I understand, yes, sir.

Q. Did you ever use a Knowles bridge?

A. No, I never did.

Q. That would be correct if I assumed that the procedure which has been followed with this man is not quite what you would have recommended, since he has been in Iowa?

A. Well, counsellor, there are many, many ways of treating fractures, open reduction, closed [135] reduction, and even the different open reductions, there are different methods.

At the present time we are using intermeduallary nails, which before World War II if anybody would have suggested it to us I know we would have been aghast. And we were all surprised when we found men walking a few weeks after a fractured femur, and yet there they were walking, over in Europe, and they had been in a German camp. And we took pictures, and there were these intermedullary nails. So you see, methods have changed.

And I have used multiple pin methods with incorporation in casts, bridges, and so forth. And I used to use plates. Now, at the present time, if possible, I try to use intermadullary, that type of thing, because I have had better results. But everybody has his own opinion on that.

Q. If this man were up and about, or at least upright in some manner, would that increase his

(Testimony of Stanford F. Hartman.)

body metabolism, and the improvement of the formation of the substance required for the knitting of bones? A. We think so.

Q. And do you know of any reason that this man couldn't be in a wheelchair?

A. It would be rather hard, the way he is. Of course, the way we like to treat people is get [136] them on their feet just as soon as possible. However, if I was going, if I selected this type of treatment, immobilization, which we all do, we all go into it many times, I would not want to take the cast off until I felt it was ready.

Q. Doctor, couldn't he be in a wheelchair without taking the cast off?

A. Well, he is in about this position, and if he were brought up too much, it would force him in there and may cause some gastric distress, and so forth. Probably he could be raised a little bit more than perfectly flat, but I don't think a wheelchair would be very comfortable for him.

Q. Could the type of cast be put on that would allow him to be in a wheelchair?

A. Not right now I don't think, sir. You see, you have to put a cast—to be an efficient cast, it has to be above and below, I mean, a joint above and a joint below the fracture site.

Well, now, the fracture is, from the X-rays, in the mid and upper third of the femur. Therefore, we would like to have it up above the hip joint to get immobilization. Otherwise, you have motion in there. That slows down healing.

(Testimony of Stanford F. Hartman.)

Q. Now, one can walk on crutches with the portion of the leg that is injured completely [137] immobilized, isn't that true? He doesn't have to bear weight on it to walk on crutches?

A. I have had people walk on crutches with long leg casts, yes, but he doesn't have a long leg cast. It would be difficult to do it with this apparatus. Children do, but not many adults.

Q. But the type of cast could have been put on him to have him so that he would be more upright and walk on crutches?

A. Well, sometimes we put a cast on just from the base of the toes up, and not include the other side, but in order to do that it has to be strengthened in the angle here, and many times it requires a heavier cast and more weight is involved than if it is put on the other side. So that doesn't help too much.

Q. The general alignment, that is, on March 1st, that is the last you know about it—the general alignment from the front view was very good, and from the lateral view was quite good?

A. Satisfactory.

Q. Except there was some—It was satisfactory?

A. Yes.

Q. And there is healing?

A. It shows some healing, yes, sir. [138]

Q. Is it coming all right, would you say? Did I understand you to say that it was coming along and was healing, but you didn't believe for sure there was enough healing to take the cast off?

(Testimony of Stanford F. Hartman.)

A. I said I didn't believe there was enough healing to remove the cast. There is no doubt in my mind of that.

Q. This instance of where he was on crutches in Iowa, and where something occurred to him in regard to the leg, you read that in the record, didn't you?

A. I remember something about it, yes, sir.

Q. You remember what that was that occurred?

A. No, I don't. I just read it. There had been something there, and I don't have the records of that, sir.

Q. He said he felt that the bone bent?

A. I wouldn't know the feeling a person would have with a bent bone.

Q. I didn't mean necessarily there was a pain, but it was his understanding it was bent.

A. That would be angling at the fracture site. Bending to most people means angulation at the fracture. That is why I don't want to take it out now. If it is taken out too soon, they do angle.

Q. Do you feel whatever occurred set him [139] back?

A. We certainly don't like to see them angle, sir.

Q. He had some mishap of some sort, as you recall from the record?

A. Apparently.

Q. Broken femurs are not uncommon, are they?

A. I see quite a few, sir.

Q. People get over them and get well?

(Testimony of Stanford F. Hartman.)

A. Our percentage is very good getting well, thank heavens. It used to be that they didn't but the methods are better now.

Q. You have seen bones, haven't you, Doctor, where the femur healed like this, and the fellow seemed, except for his leg being short, seemed to get along as well as otherwise?

A. I have seen fractures of that nature in the femur, what we call overriding, that heal very well and give a very good function.

Q. It would make his leg short, though?

A. There would be a shortness, yes, particularly if he was past the growing age, and he is.

Mr. Wilson: That is all.

Mr. Mahoney: That is all. May this witness be excused, your Honor.

The Court: Yes.

(Witness excused.) [140]

Mr. Raineri: I call Mr. Deuel.

DONALD EDWARD DEUEL

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Raineri:

Q. Will you please state your full name?

A. Donald Edward Deuel.

Mr. Raineri: May these be marked for identification, if the Court please.

(Testimony of Donald Edward Deuel.)

The Clerk: Plaintiffs' Exhibits 9 to 13, inclusive, for identification.

(Said photographs were marked as Plaintiffs' Exhibits 9 to 13, inclusive, for identification.)

Q. (By Mr. Raineri): And what is your business, Mr. Deuel?

A. I am a photographer here in Phoenix.

Q. And were you asked to take certain pictures of an automobile that was involved in an accident near Tempe approximately a year or so ago?

A. Yes, sir.

Q. And were you also asked to take pictures of the scene of that particular accident?

A. No, sir, no photographs of the scene.

Q. I show you Plaintiffs' Exhibits 9 through 13, inclusive, and ask you what those are, if you [141] know? A. These are the photographs.

Q. Will you look them all over first?

A. Okay. These are the photographs which I took. I did not recognize this one.

Q. When you say this one, for the record you are referring to Exhibit 9? Plaintiffs' Exhibit 9, you did not take that one?

A. No, I had nothing to do with that.

Mr. Wilson: May I ask him on voir dire, your Honor?

The Court: All right.

Q. (By Mr. Wilson): Did you take these pictures at the scene of the accident? A. No, sir.

Q. Where did you take them?

(Testimony of Donald Edward Deuel.)

A. Over at the V & B Auto Wrecking yard between Tempe and Mesa.

Q. And it is a place where there are many wrecked automobiles? A. Yes, sir.

Q. And what day did you take them on? Have you got a record of it?

A. I have a record of it. I don't recall in my mind the exact date.

Q. Did you mark it on the pictures? [142]

A. I have it dated with my negative files, what date they were taken. I don't know whether I marked them on the back or not.

Q. You took a picture of this car because someone asked you, or pointed it out, or anything of that sort? A. An attorney asked me to take it.

Q. What attorney?

A. It was Mr. Cracchiolo.

Q. Did he make any statement to you as to this being the A car or the B car, or what it was?

A. He described the car to me, so I knew what car it was.

Q. Over the telephone?

A. Personally and over the telephone. We had two appointments on it.

Q. He told you to go there and take a picture of a car that was described like this?

A. Described the car, the license, and all the details so I would not miss it, and which car we wanted, and so forth.

Mr. Wilson: No objection.

(Testimony of Donald Edward Deuel.)

Mr. Gibbons: No objection.

Mr. Raineri: We will offer 13, 11, 12, and 10 as Plaintiffs' Exhibits in evidence.

The Court: All right. [143]

The Clerk: Plaintiffs' Exhibits 10, 11, 12, and 13 in evidence.

(Said photographs were received in evidence and marked Plaintiffs' Exhibits 10, 11, 12, and 13, respectively.)

Mr. Raineri: May we hand these to the jury, your Honor.

The Court: You may.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Raineri: If it please the Court, I would like at this time, before we rest, to offer the mortality tables into evidence.

They show that this man had a life expectancy of eleven and some tenths years.

The Court: All right.

Mr. Raineri: At this time, too, we would like to offer any and all other exhibits that we may have presented here that have not been offered, that is, make a blanket offer.

The Court: You better find out what they are.

Mr. Raineri: We will withdraw that offer. I understand from the Clerk they are all offered.

Mr. Mahoney: We rest, your Honor.

The Court: All right. You may proceed.

Mr. Wilson: May it please the court, we [144] would like to make a motion, and I wonder what your Honor's pleasure is.

The Court: We will excuse the jury until two o'clock. Come back at two.

(The Jury was excused.)

The Court: Go ahead with your motion.

Mr. Wilson: May it please the Court, on behalf of P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, we move for a directed verdict in their favor, and against the plaintiffs, on the following grounds:

One, there is no evidence of the moving parties having driven the vehicles, or either of them, in a negligent, careless, reckless, or wanton manner.

Two, there is no evidence of their having driven the vehicles in any manner.

Three, there is no evidence that the vehicle of the moving parties was on the highway with their consent, or in the course of their business, or in any kind of a joint enterprise of any sort. There is nothing at all to connect that.

Four, there is no agency shown between Carroll and P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus & Carnival, no agency whatsoever, not any that could be attributed to it that I know of. [145]

The Court: You want to join in that motion?

Mr. Gibbons: I do, your Honor.

The Court: Motion denied.

Court will stand at recess until two o'clock.

(Thereupon a recess was taken until two o'clock p.m., of the same day.) [146]

Wednesday, April 14, 1954—2:00 P.M.

The Court: You may proceed.

Thereupon the defendants introduced the following evidence:

Mr. Wilson: I will call Dr. Bishop.

W. A. BISHOP, JR.

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name, please?

A. W. A. Bishop, Jr., M.D.

Q. Are you admitted to the practice of medicine in the state of Arizona? A. Yes, sir, I am.

Q. What education do you have on the [147] subject?

A. I graduated from medical school at Baylor University when I was in Dallas in 1935. I interned at the Cincinnati General Hospital at Cincinnati, Ohio, from July, 1935 to July, 1936. I remained preparing for my specialty in orthopedic surgery at the Cincinnati General Hospital.

For the following year, from July, 1937, to 1938. I was orthopedic resident at the Cincinnati General Hospital, and at the Crippled Children's Hospital in Cincinnati, then moved to Oklahoma City where

(Testimony of W. A. Bishop, Jr.)

I was resident at the University and Crippled Children's Hospital from July, 1938, to July, 1939.

I was research fellow in orthopedic surgery at the University of Oklahoma Medical School from July, 1939, to January, 1940. I have been practicing orthopedic surgery since then.

Q. What is orthopedic surgery?

A. Orthopedic surgery is that specialty which deals with diseases and the injuries of the spine and extremities.

Q. What do you mean, the spine and extremities?

A. We are more commonly known, probably, as bone and joint surgeons.

Q. Do you take any other kind of practice?

A. No, sir, I do not.

Q. Do you know George Gossnell? [148]

A. I saw Mr. Gossnell first this morning in the office.

Q. In your office? A. Yes, sir.

Q. Did you examine him?

A. Yes, sir, I did.

Q. Would you tell the court and jury what you found upon this examination?

A. Well, as is customary, we always take a history before examining a patient. While the X-rays were being taken, I obtained from Mr. Gossnell the history that he had had injuries on the 20th of February, 1953. I was more interested in what he had had in the way of treatment, and what had happened to him since then.

He had had multiple injuries, particularly to his

(Testimony of W. A. Bishop, Jr.)

left thigh, for which he was treated in traction by Dr. Von Pohle at the Tempe Clinic Hospital for approximately nine weeks, a cast being applied approximately one week before that.

Then he travelled by plane to Fort Dodge, Iowa, where he was admitted to the St. Joseph's Hospital, under the care of his family physician, Dr. Emerson Dawson, and who called in Dr. Fred Knowles, an orthopedic surgeon.

After he had been there approximately three [149] weeks, the cast was removed, and an operation was performed on the 25th of May on the fracture in the upper left thigh, at which time the bone was opened up, and to hold it in position, pins were placed through the skin two above and two below the fracture site, and that these were connected with an apparatus to get rid of the cast, to hold the bone in place, so that the cast wouldn't have to be in position.

That he remained in the hospital, then, until—for a few more weeks, and then he went home on the 11th of August, walking part time on crutches.

He remained at his home until the 25th of October, when he was readmitted to the hospital. The pins were removed, the pins were taken out of the bone. Then he gave the history that two days later, or on the 27th of October, 1953, that while being turned in bed that the fracture in the upper portion of the thigh bone or femur on the left rebroke or bent, and that his present cast, which he is wearing now, was applied on the 27th of October, two days after

(Testimony of W. A. Bishop, Jr.)

the pins had been removed, and he still has that cast in position.

He further told me in response to our conversation and questions that he had had some pain in his chest, where he had been told that he had some fractured ribs on the left, that that pain in the [150] left chest had bothered him up until several months ago, but he had had no trouble whatsoever since.

That up until last fall, the middle of the summer, or last fall, that he had had some dizziness when he quickly turned his head to the left, but he said that had also cleared up.

The only discomfort that he has at the present time, or has had for any period of time, is some discomfort in his upper left thigh, which he indicated as being in the region of where the break is that there has been so much difficulty with. In coughing or sneezing he would have some discomfort in that area. No other discomfort, however.

In asking why he made this trip in the cast, and so forth, he said that it was his understanding that the cast was going to be removed when he got back and some X-rays taken to determine what type of treatment, if any, that he would have to have after that.

Q. Would you have pursued the type of treatment that this man has received?

A. Mr. Gossnell is 66 years of age, and although the types of treatment that he has used, the first type of treatment, the traction, was developed during World War I, and the type of pin fixation which most of us are acquainted with as the stator [151]

(Testimony of W. A. Bishop, Jr.)

type of treatment, which was publicized during the first part of World War I is pretty well discarded for the reason that too many of those patients develop non-union or delayed union, or fail to heal early, as has happened in this case.

I wouldn't have treated him as he has been, but patients are treated in this type of manner, as illustrated by this particular type of patient.

Q. Are you acquainted with the Knowles bridge?

A. Yes, sir, I am. It is very similar to the Clayton bar. Dr. Clayton lives in Forth Worth, Texas. It is the same principle as the Roger Anderson apparatus, as the stator splint which I have just mentioned. They all have identically the same principle of external immobilization, is what it amounts to. The idea back of it all is to get rid of the cast, to permit motion in the joint above and below, so there will be better circulation.

Q. Did you take pictures of him?

A. Yes, sir, I did. We took a number of X-rays, including his skull, his chest, his pelvis, his femur or thigh bone on the left, and his tibia or bone below the knee on the left. I have those films with me.

Q. Were you impeded in your examination by the cast? [152]

A. After all, I couldn't examine the left lower extremity, and as far as I can determine from talking to Mr. Gossnell, that is the only thing that has bothered him now, is the fact that he has had to wear the casts for those fractures that did occur

(Testimony of W. A. Bishop, Jr.)

to that extremity, and of course we couldn't examine it with the cast on.

Q. Does it impede the taking of X-ray pictures?

A. You can get X-ray films. After all, an X-ray is merely a shadow, and it is like trying to look through a curtain, so to speak, at something that you are seeing a shadow of beyond. You can't get nearly as good detail of the bone as you can if you don't have the cast on, because you have superimposed on top of the bone the shadow of the cast, and the cast does cast a shadow in the X-ray.

Q. Could this cast be removed for purpose of examination, and be replaced without damaging Mr. Gosnell?

A. I would think so, yes, sir. This cast was applied—I was a little bit surprised that he still had a cast on, without having it removed in this period of time. It was applied on the 28th of October. That is a little over five months, approximately five and a half months that he has had this cast on without having it off for any examination, [153] or any X-rays, and by looking at the X-rays through the cast, one would assume that the fracture has healed. You can't be certain that it is, for the simple reason that there are shadows of the cast on top of it.

But there is evidence of callous formation, and I would be of the opinion that the fracture is healed.

Q. Would you show us the pictures?

A. We will start up high. And this is the same as if you were looking at him from the front with

(Testimony of W. A. Bishop, Jr.)

his right side not being in the cast, his left side being encased in the cast.

The reason I show the pelvis is because it shows part of the skeleton in the cast, and part of it outside of the cast.

On this side you can see the head of the femur, or where it fits into the socket joint without the cast in front of it, and on the opposite side the cast is in front, and you can see what the shadow does to it.

I want to call your attention to the fact that there is what we call marked decalcification even of the opposite extremity. That happens in all individuals when they pass forty. It happens in some individuals more rapidly than others, and it [154] usually proceeds through life as long as a person lives.

And in connection with a discussion of decalcification, the less callous there is in the bone, as a general rule, the longer it takes that bone to heal.

This is the left femur or thigh bone taken from the front. You can see very well the cast, and you can see that there has been a wedging. The cast has been cut in two at this region, or something has happened to it, because you can see the cuts in it. You can see here, unfortunately, at one of the lines where the cast has been cut, this upper fracture. That is the one he has had the most trouble with.

Now, you can also see without any use of your imagination four, two below and two above, and due to the shadows of the cast, you can see them below the fracture site much easier, where those pins were inserted to hold the bone.

(Testimony of W. A. Bishop, Jr.)

Now, the apparatus consists of a pin. It is a little smaller than this pencil, but one would go in there, one here, and one here, and they would go on the outside with a bar, and by fastening them tightly together with these pins in the patient doesn't have to have the cast on.

You can see the fracture line. [155]

Now, there is another fracture down here which you can see. It is displaced probably an eighth of an inch, and you can see the slight offset in it there. It would be a little bit difficult through the cast to see this irregular fracture line that runs through there if it were not for this slight offset. That is taken from the front. That is the left thigh bone.

Then taking the same bone from the side, again through the cast, you can see one hole. You can't see all the holes, but there is one of the holes. There is a hole in both sides of the bone, and in this particular one you are catching both sides where you are looking straight through it.

And in the other holes, where the X-ray would be in such an angle that it would catch a hole on one side, you would not see through the hole on the other, and that accounts for the fact you do not see all of them.

In other words, the shadow doesn't show up unless there is a hole on both sides. The bone is kind of like a pipe. It is hollow, and if you are looking through it, and there is a hole on both sides, you can see through, which you can see by this hole here. But those holes have to be lined up with your

(Testimony of W. A. Bishop, Jr.)

sight, or with the X-rays, if the X-ray shows [156] through. So you can see that.

The fracture again is seen. Then there is a little bit of an offset here, as you can see. That offset is considered in excellent position, because the other way, looking at it from the front, it was exactly like this, with no offset from side to side. But when you look at it at the side, it is approximately three-quarters. Three-fourths is plenty adequate, and it is very seldom in a thigh bone we get better than that, as far as position is concerned.

Again down below, you can see what I meant when I talked about the shadows of the cast. You can see those shadows there. When they go across the bone it is pretty hard to see these fractures, but there is a slight offset there, and a slight offset here of an eighth of an inch. And you can see some irregularity that probably represents it. But the other fracture is there.

I took the tibia, or the bone below the knee, and we were unable to show any offset in any bone. Both of those are visualized well.

In this particular X-ray I can't see any variation from the normal, and in the X-ray of the tibia.

In the fibula it appears that there was a [157] fracture right here. There is a little bit of a misalignment there, and there is what appears to be a crack, and a little bit of enlargement of the bone. But that is in excellent alignment, and if there was a fracture there, I am sure it is healed to the extent that that would not be disabling.

(Testimony of W. A. Bishop, Jr.)

Again you can see that the bone is pretty much of a shell.

Of course, the normal bone X-ray for comparison, we don't have that, but here is the ankle joint. You can't see the cortex or outer shell of the bone in spots here, it is so thin.

Up here is another area where you cannot see it. And these black spots in here, ordinarily you see these little striations or lines. Those represent the inner structure of the bone, which I am sure most of you have seen in animals, in beef bones, and so forth.

So with reference to the chest, we took only one film. It didn't show anything to be abnormal. His heart is of the average size. These white spots, that is probably a healed tuberculous node. It is a calcified area, at any rate, in his chest.

He was supposed to have some fractures of the left ribs. This being the left side, we followed [158] all of these left ribs out, and if there was a fracture there, it is healed to the extent that it can't be shown.

That is entirely possible, however, because a fractured rib, if it is in position, and isn't displaced, would heal in this period of time to where you would have to have an X-ray just exactly right to show it.

After all, the ribs are curved, they form a curve around, and if the fracture was here, and the film, the X-ray was coming through at an angle like that you wouldn't show it. If you took several films,

(Testimony of W. A. Bishop, Jr.)

pointing them toward the edge all the way, if there had been a fracture, we could pick it up.

But he has no pain in his chest. There is no thickening of the lining of his chest. The lung fields are clear, and we did not take further X-rays.

With reference to his skull, I can't—if he had a fractured skull, it is healed. There is some question. There is a line—these little lines here are blood vessels which lie on the outer side of the brain, and instead of the space being in the brain for it, the space, half the space is in the skull, leaving markings.

In other words, if you looked inside the [159] skull, you could see the markings where all the blood vessels were.

These markings here are blood vessel marks. There is a marking there which might represent the residual of a healed fracture. Looking at it from the side there is a straight line across there which would be, possibly. These others are blood vessel markings, which are normal findings. And there are no other variations from the normal in his skull.

That constituted our X-ray findings.

Q. Does a metabolism favorable to the healing of bones in a man of the age of this man increase or decrease with immobility?

A. It decreases with immobility for the reason—And that is the reason why we try to use the type of treatment which will permit a patient up, for the reason that the circulation is more sluggish, and with sluggish circulation there is an accumulation of

(Testimony of W. A. Bishop, Jr.)

waste products in the blood, and notably carbon dioxide as being the active element.

In this instance, calcium is very soluble in the presence of carbon dioxide. It forms a carbonic acid of a weak solution in the blood, and any patient who has a sluggish circulation in an extremity will lose a lot of calcium. In fact, it is one of the things we run into with patients—Let us [160] get away from injuries completely. A patient who has poliomyelitis, and is badly involved, and lies immobile in bed, those patients lose extreme amounts of calcium from their bone. It comes into the blood first, and then through the kidneys, and those same patients have a tendency to develop kidney stones, and that is one of the big things we have in that type of patient, is because of the immobility.

We are using, for example, in polio, to illustrate how important it has come to be in our way of thinking, we are using so-called rocking beds, and anybody who has been around a hospital where they are treating many polio patients will see them on these rocking beds. That stimulates, or helps to stimulate the circulation, get the stagnant blood out of the extremities to the lungs to get rid of these products.

Q. Would this man be better off if he were upright?

A. In my opinion, he would be very much better off. He is in excellent physical condition, I would consider, for a man of 66 who has been in bed for

(Testimony of W. A. Bishop, Jr.)

a year, and has had one operation for multiple injuries. But if we had been treating him, we would have gotten him up one way or another, because they always do better when they are up. [161]

Q. What is your prognosis from your examination, of what could be done with him now?

A. Well, I think I could best answer that by telling you what I would do if it were turned over to me. In the first place, I would get the cast off.

If X-ray examination and feeling of the leg showed that there was still motion, which I don't believe there would be, but if there was motion, I would immediately do a bone graft operation. I would not put him back in a cast, but I would use other types of skeletal fixation.

And since World War II we have used, and it is used all over the world, they are now universally using intra-medullary nails. The medullary space is the space down the center of the pipe or long bone, and we slide these down the center, and it is rigid, and then a patient can be up.

It also permits him to keep the joints in the extremities limber, and, too, if there is absorption of the bone ends, which normally occurs in healing, it permits the bones to slide together and maintain good contact. And that is the main reason why most orthopedic surgeons in America do not like the type of pin fixation he had, because if it is rigid enough to hold the bones together, it is [162] also rigid enough to hold those bones apart. If there is some absorption and they do not have pressure

(Testimony of W. A. Bishop, Jr.)

contact, which has been proven to be necessary for healing of bones, and that has been proven by merely distracting or overpulling, and placing them with plates and other apparatus holding the bone ends apart, and they will not heal.

Even in children it has been proven, accidentally, of course—it was not done intentionally—but in dogs it can be done experimentally and produce non-union in that manner.

Q. How long would it be before you would get him out of bed if he were turned over to you?

A. If he were turned over to me, certainly by tomorrow. If he did not have to be operated on, I would have him out of bed in a wheelchair, at least, by tomorrow, and have him on crutches very soon thereafter. If I would have to have an operation, I would have him on crutches in at least two weeks.

Q. You said it appears to you from your examination you don't believe he would have to have an operation?

A. No, sir, I do not believe it would be necessary.
Mr. Wilson: You may examine. [163]

Cross-Examination

By Mr. Raineri:

Q. Doctor, you testified you heard of Dr. Knowles? A. Yes, sir.

Q. And he is supposed to be an eminent orthopedist, isn't that right?

(Testimony of W. A. Bishop, Jr.)

A. Dr. Knowles is one of the oldtime orthopedists.

Q. He is well-known in his field, isn't that right?

A. Well, probably no better known than most of the other orthopedists around the country.

Q. You have heard of him, anyway?

A. Yes, sir, I have heard of him.

Q. You know he is the man that has been taking care of Mr. Gossnell back in Iowa?

A. Yes, sir.

Q. All doctors don't agree, do they—I mean, orthopedists don't agree as to what is the best method of treating a patient? You might, as an orthopedist, think one method was the best, and another doctor might think that another method was the best, isn't that right?

A. That is right.

Q. And if Dr. Hartman so testified on the stand here in court this morning and made that [164] same statement, he would be correct, isn't that right? A. That is right.

Q. Now, in taking the history from Mr. Gossnell, did you learn from him whether he had had an embolism or not?

A. It came out. He told me that he had had an embolism, but we didn't go into the degree of his illness, how it was diagnosed, and so forth.

Q. Well, now, when there is an embolism, there is always danger in performing an operation, isn't that right?

A. When there is an embolism—in fact, there

(Testimony of W. A. Bishop, Jr.)

are a number of kinds of embolisms, and unless we know for sure, we can't very well discuss it. There are fatty embolisms which a patient most likely would have early, because he has no evidence of an embolism of the type that would result from the breaking loose of a clot elsewhere, and lodging in his lungs.

Maybe we better describe an embolism. By embolism we mean something circulating in the blood which lodges elsewhere. After it lodges, it is called an embolism. Patients who have fracture can have so-called fat embolism. All of you have seen the marrow of bone, and you have seen how much fat there is in it.

Sometimes in breaking one of those bones, [165] there is a vessel which is left open, because it is attached to the bone, and this fat will get into the vessel and get into the circulation. The emboli can lie in the lungs and make a condition that simulates pneumonia, or lodge in the brain, which will give a condition which temporarily resembles a stroke.

The other type of embolism is where a clot forms in a vessel and subsequently breaks loose, and that of course invariably lodges in the lungs, provided that the heart is normal.

In some hearts the blood can pass through, but he has no murmur, and no findings that would indicate that there is any short circuit in his heart.

Q. Well, if there is a history of an embolism in a case, it is dangerous to operate, isn't it?

A. Not necessarily. There is treatment for fatty

(Testimony of W. A. Bishop, Jr.)

embolism. There is treatment for embolism originating in the veins, and certainly you can operate in either instance within two or three weeks.

Q. But I say, there is the danger of death resulting where there is embolism in the picture, isn't there?

A. There is danger of death at any time that embolism exists. [166]

Q. Now, if his doctors back there, and Dr. Hartman here testified, and they were his attending physicians, and they were familiar with his condition, testified or stated that in their opinion that it wouldn't have been safe here to operate on him because of this danger of the after-results from an embolism, why, they would be taking the correct precautionary measures, isn't that right?

A. All I can say is we have never found it necessary to delay an operation more than two or three weeks when an embolism had existed.

Q. You mean you would take a chance regardless of the outcome?

A. We have never been sorry that we did perform surgery under such circumstances by treating the patient prior to and following the operation for the thing which caused the embolism.

Q. But that is a medical precaution, that some doctors do that, is that correct? A. Yes, sir.

Q. Now, when you said that you would remove the cast and try to get the man up on his feet, that is what essentially Dr. Knowles tried to do last May when he got back to Fort Dodge? He removed

(Testimony of W. A. Bishop, Jr.)

the cast and tried to get the man up, isn't that right?

A. From what the patient said, there was [167] not too great an effort to get him up, because he said he was actually up only two or three times a day for very short periods.

Q. The cast was off, though, from May until October, isn't that right?

A. I believe it was the 11th of May until the 25th of October.

Q. Yes. And after all that period of time, it was found that there was not progressive healing, or I mean that this bending took place, and it was necessary to put the cast back on? Isn't that the history you got? A. Yes, sir.

Q. Now, you say that you would remove the cast and determine if there was motion. What do you mean by that?

A. At any time that we remove a cast from a patient like this, we would take new X-rays also, and we would satisfy ourselves that there was no motion at the fracture, and that there was healing, by X-ray, and knowing that, we would use very persuasive methods, if we had to, to get the patient up.

Q. In other words, then, what you meant by motion is that you would try to determine whether that fracture was healed, or not, is that right? [168]

A. That would be a precautionary measure that any orthopedic surgeon I am sure would take.

Q. If there was no proper motion there, or if the motion was not satisfactory, you would have a

(Testimony of W. A. Bishop, Jr.)

bending like you had last October again, isn't that right?

A. If it isn't united, he could have bending, sure.

Mr. Raineri: That is all.

Redirect Examination

By Mr. Wilson:

Q. You know Dr. Pohle?

A. Yes, sir, I do.

Q. Does he have a reputation in medical circles of being an orthopedist, or an orthopedic surgeon?

A. I don't believe he contends to be. No, sir, he does not.

Q. Doctor, if it were shown to you that Dr. Hartman's bill for his attention to this man was \$75.00, and Dr. Pohle's bill, including his stay in Dr. Pohle's hospital, was \$2,752.00, would you think he was under Dr. Hartman's care or Dr. Pohle's care?

A. I would think he was under Dr. Pohle's care.

Q. Dr. Hartman testified he saw him three [169] times. Doctor, have you ever seen me? Do you know me at all?

A. I don't believe if I met you on the street—I think I have—we have been to a meeting or someplace together. I wouldn't know for sure where it was.

Q. I had no conversation with you with regard to this matter prior to your coming here today?

A. No, sir.

(Testimony of W. A. Bishop, Jr.)

Q. And, in your opinion, the condition of Mr. Gossnell is that there is excellent alignment?

A. Yes, sir.

Q. And that the healing, in your opinion, is probable?

A. Yes, sir. I think it is most likely, from the films, that it is uniting.

Mr. Wilson: That is all.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Wilson: I call Mr. Carroll. [170]

SIMEON J. CARROLL

called as a witness in behalf of defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name.

A. Simeon J. Carroll.

Q. Are you one of the defendants in this case?

A. Yes, sir, I am.

Q. Are you an employee of Siebrand Brothers Circus and Carnival?

A. No, sir.

Q. Have you ever been?

A. No, sir, I haven't.

Q. Are you an employee of Pete Siebrand?

A. No, sir, I am not.

Q. Have you ever been?

A. Never have been.

(Testimony of Simeon J. Carroll.)

Q. Are you an employee of Hiko Siebrand?

A. No, I am not.

Q. Have you ever been? A. Never been.

Q. You have been here during the conversation and the discussion of this case, and heard the witnesses? A. Yes, sir. [171]

Q. Did you drive a truck belonging to Pete and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, on the day that this accident occurred? A. Yes, sir, I did.

Q. Did you on that day have a chauffeur's license? A. No, sir, I didn't.

Q. Where did you reside at that time? Where did you live?

A. You mean my home? It is in Georgia.

Q. And what kind of a truck was this that you drove? A. It was a pick-up.

Q. Did you drive it for Pete Siebrand?

A. No, sir.

Q. Did you drive it for Hiko Siebrand?

A. No, sir.

Q. Did you drive it for Pete and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival? A. No, sir, I did not.

Q. Who did you drive it for?

A. I drove it for Bill Siebrand.

Q. Did you have the consent of Pete Siebrand to drive that truck? [172]

A. No, sir, I didn't.

Q. Did you have the consent of Hiko Siebrand

(Testimony of Simeon J. Carroll.)

to drive that truck? A. No, sir.

Q. Did you have the consent of any employee or agent of theirs, to your knowledge, who had such authority as to be able to give you such consent? A. No, sir.

Q. Did you have the consent of anybody, whether you had authority or not?

A. You get me confused. I had permission to drive the truck, but I got the wrong truck.

Q. You had permission to drive a truck, but you got the wrong truck? A. Yes, sir.

Q. Would you tell the court and jury about that?

A. Well, the day before, why, Bill Siebrand asked me if I would take his truck and trailer over for him, and I said that I would. And I went out the next morning to hook it up and take it over, and that was when the accident occurred.

Q. Was there anybody in the lot at the time? Was Pete Siebrand at the lot?

A. No, sir. [173]

Q. When you hooked up the truck, or when you left? A. No, sir.

Q. Was Hiko Siebrand there when you left?

A. No, sir.

Q. Or when you hooked it up? A. No, sir.

Q. Where did you hook it up?

A. 2307 East Van Buren.

Q. Is that the Siebrand's regular winter quarters lot? A. Yes, sir.

(Testimony of Simeon J. Carroll.)

Q. Have you been at all acquainted with the Siebrands to know them?

A. Yes, sir, I know them.

Q. How long do you know them?

A. Since 1948.

Q. And have you ever been on their show in any way? A. Yes, sir.

Q. And what is your business in connection with shows, if any?

A. I am a concessionnaire.

Q. And when you went out to pick up this trailer and hook it onto—what kind of a truck did you hook it onto? [174]

A. It was a pick-up.

Q. What? A. A pick-up.

Q. And had Bill Siebrand told you what kind of a truck to hook it onto?

A. He just said his red pick-up, is all. Take his red pick-up and trailer over.

Q. Did you take it with the red pick-up?

A. Yes, sir, I did.

Q. And where was the red pick-up that you took it with when you encountered it?

A. Well, it was on this side of the trailer. Is that what you want, the location?

Q. Was it on this lot? A. Yes, sir.

Q. And is the lot fenced?

A. No, sir. Pardon me, sir, I think it is fenced on some sides.

Q. But there is a gate on one side to get into?

A. The front isn't fenced.

(Testimony of Simeon J. Carroll.)

Q. That is the Van Buren Street side?

A. That is right.

Q. Where did you get the keys for this truck?

A. It was in the truck.

Q. Have you had any experience with pulling a trailer? [175]

A. Yes, I have had a couple of trailers myself.

Q. And did you hitch this trailer onto this truck yourself? A. Yes, sir, I did.

Q. And did you examine the hitch before you put it on?

A. Well, I tried to examine everything. I examined the hitch and ball, and looked at the tires.

Q. By the hitch and ball, what do you mean by that?

A. Well, it is on the truck. The hitch goes on over.

Q. Mr. Carroll, I hand you an object here which looks slightly like a ball. Does this resemble the ball that you refer to? A. It is a ball.

Mr. Mahoney: Better mark it.

Mr. Wilson: Have it marked for Mr. Mahoney.

Could we at this time offer the X-rays from which the doctor testified?

Mr. Raineri: No objection.

Mr. Mahoney: No objection.

Mr. Wilson: We would like to offer them in evidence.

The Clerk: Defendants' Exhibit A in [176] evidence.

(Testimony of Simeon J. Carroll.)

(Said X-rays were received in evidence and marked Defendants' Exhibit A.)

The Clerk: Defendants' Exhibit B for identification.

(Said object was marked as Defendants' Exhibit B for identification.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit B for identification, and is that what you would ordinarily term a part of a trailer hitch?

A. Well, I guess you would, although it is not a trailer hitch itself. This goes on the——

Q. Where does that part go, as a rule?

A. On the vehicle that is pulling it.

Q. Was there one on this vehicle similar to that?

A. Yes, there was.

Q. And in what position does it fit on the vehicle? A. Like this (indicating).

Q. Upright? A. Yes, sir.

Q. Then what you term the trailer hitch is on the truck? I mean, on the trailer, is that what you mean, is that correct? [177]

What you term the trailer hitch is on the trailer, and it hitches onto this, is that correct?

A. Yes, sir.

Mr. Wilson: May this be marked as Defendants' Exhibit C for identification?

The Clerk: Defendants' Exhibit C for identification.

(Said object was marked as Defendants' Exhibit C for identification.)

(Testimony of Simeon J. Carroll.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit C for identification, and ask you if you know what this is?

A. That is a hitch, too, sir.

Q. This is a trailer hitch also?

A. Yes, sir.

Q. And it has a ball in it, is that correct?

A. Yes, sir.

Q. Now, I hand you Defendants' Exhibit D for identification, and ask you if you know what this is?

A. That is a trailer hitch, too.

Q. Are these two hitches familiar to you, this type of hitch?

A. Yes, sir, but I think this first one you showed me is for a light trailer, or something. [178]

Q. This one? A. Yes, sir.

Q. For what? A. A light trailer.

Q. Now, are these common trailer hitches?

A. Yes, they are.

Q. Was either one of this type of trailer hitch used on this trailer?

A. Yes, sir.

Q. Which one? A. The one on the right.

Q. The one on the right which I have referred to as Defendants' Exhibit D?

A. That is right, sir.

Q. You have examined it. You are familiar with it?

A. Yes, sir.

Q. This is the kind of a trailer hitch that was on this trailer on that day?

A. Well, to all appearance, yes, sir, it is the same type. I couldn't exactly say it was the same,

(Testimony of Simeon J. Carroll.)

manufactured by the same people, if that is what you mean.

Q. This Exhibit C for identification is not the type that was on there?

A. Definitely not. [179]

Q. You notice there is a wheel on the top of C, and there is not a wheel on top of D?

A. Yes, sir.

Mr. Wilson: I offer Exhibit D in evidence as an example of the hitch that was used.

Mr. Raineri: May I ask the witness some questions on voir dire?

The Court: All right, go ahead.

Q. (By Mr. Raineri): You only saw that trailer that one time, that trailer hitch that one time, is that right? A. You are right, sir.

Q. And you haven't seen it since?

A. Well, I have seen it since but they was taking it off and putting a new one on.

Q. I mean, you don't know? That was the only time you saw it, was that one day?

A. It was the only time I had occasion. I might have just glanced at it, or something, but it was the only time I had the opportunity of coming in contact with it.

Q. You are not a regular truck driver, are you?

A. No, I am not.

Q. You are a concessionnaire?

A. Yes, sir.

Q. And in fact, you are not too familiar [180] with the work of a truck driver, or an employee

(Testimony of Simeon J. Carroll.)

that would pull a trailer? You are not familiar with it?

A. Well, I pull trailers. I own a trailer myself.

Q. That is not in your regular line of work?

A. You mean truck driver?

Q. Yes. A. No, sir.

Q. So that you are probably familiar with a trailer and truck that you owned at one time, but I mean generally you haven't had experience with that type of work, or with trailers, or the hitches that are used on them, and so forth, are you?

A. Well, this was the same type of hitch I had on my trailer.

Q. You haven't examined it since that time? You only saw it that one time?

A. To come in contact with it, yes, sir.

Q. And here when you were being questioned here on direct examination, I took down your answer to one or two questions, and you said, "To all appearances it could be the type that was used."

Now, you are not sure of that? When you say "To all appearances," that means you are not positive as to what type it was, isn't that right? [181]

A. I am sure it is the same appearance, yes, but the same, identically, I can't say it was manufactured by the same people, because I don't know.

Mr. Raineri: That is all.

Mr. Wilson: I offer it.

Mr. Raineri: No objection.

Mr. Mahoney: No objection.

(Testimony of Simeon J. Carroll.)

The Clerk: Defendants' Exhibit D in evidence.

(Said object was received in evidence and marked Defendants' Exhibit D.)

Q. (By Mr. Wilson): Mr. Carroll, where does the tongue, or whatever it is, go on to this hitch, or where does the hitch go on to the tongue?

A. To the trailer?

Q. Yes.

A. Well, like the trailer would be this way (indicating).

Q. And do they use a single tongue coming in, or do they use two tongues? What would be the type on those, if you know?

A. It comes to a "V."

Q. You note the drawing made by the officer. Is that the type that was on the trailer? [182]

A. Yes, it is. The only thing, he doesn't show this thing solid here, the way it should be.

Q. I don't know, but I took this to be the tongue, and the hitch to be on the end of it.

Did you hear him testify about a hole?

A. Yes, sir.

Q. In this thing that had not been broken?

A. I certainly did.

Q. And that had threads in it?

A. I certainly did.

Q. Now, would you step over here, Mr. Carroll.

Take that ball, and see that the ball is on the truck. I will be the truck. Fasten this trailer on here, will you please?

(Testimony of Simeon J. Carroll.)

A. (Witness complies.)

Q. Is it fastened onto the truck now?

A. Yes, sir.

Q. And you can turn the trailer? And you can't get it off, is that correct? A. Yes.

Q. You know what this hole is for?

A. Yes, sir.

Q. In this position, is this all here, as far as the hitch is concerned? What holds it on the truck? Is it all there? A. Yes, sir. [183]

Q. Nothing missing? A. No.

Q. Nothing out, nothing gone, nothing anywhere else?

Mr. Mahoney: I object to this leading, your Honor.

The Witness: No, there is nothing missing.

Mr. Wilson: All right. Excuse me.

Mr. Mahoney: That is all right.

Mr. Wilson: That is all right. I will let you lead him a while.

Q. (By Mr. Wilson): Now, do you think this is the hole that the officer referred to?

A. I know it has to be.

Q. Would you know what that hole is for?

A. I certainly do.

Mr. Wilson: May this be marked Defendants' Exhibit E for identification?

The Clerk: Defendants' Exhibit E for identification.

(Said object was marked as Defendants' Exhibit E for identification.)

(Testimony of Simeon J. Carroll.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit E for [184] identification, and ask you if you know what this is?

A. That is a jack handle.

Q. A jack handle?

A. It is for the trailer, when it is not connected up to any vehicle, to raise or lower the front end.

Q. You tried to put this in there?

A. No, sir.

Q. It is for the trailer when it is not connected with the vehicle? A. Yes, sir.

Q. Would you put this in the hitch and show the jury where it goes?

A. Yes, sir. (Demonstrates.)

Q. At the time that you and this officer met each other over there on that bridge, this was not in here? A. No, it was not.

Q. Go ahead, put it in. This goes down for what purpose, now?

A. To hold the front end of the trailer up.

Q. And when it is parked? A. Yes.

Q. And this extends clear on down to keep the trailer tongue level, is that correct? [185]

A. Yes, sir.

Q. And you can screw it right on down through there, could you, if I could hold it?

A. Yes. It is tight now.

Q. All right, now, it will go clear on up to here, is that right? A. Yes.

Q. Now, will you disengage this trailer hitch from the truck?

(Testimony of Simeon J. Carroll.)

A. (Witness demonstrates.)

Q. Now, put it back on the truck.

A. (Witness demonstrates as requested.)

Q. It is on there now? A. Yes, it is.

Mr. Wilson: Now I will show it to the jury.

If you will take hold of that, I will let it out for you.

Q. (By Mr. Wilson): This is an ordinary type of trailer hitch?

A. That is the kind that was on there, yes.

Q. Is it the common type, is it in common use?

A. I think it is the mostly widely used.

Q. For what kind of trailers?

A. Light trailers, house trailers, such as that.

Q. You notice a hole through here, Mr. [186] Carroll? A. Yes, sir.

Q. And what is that for?

A. That is for a safety lock.

Q. You put a pin through there, or something?

A. Yes, sir.

Q. I believe you said that you inspected the ball and the trailer hitch, and put the two of them together, and the truck was Mr. Pete Siebrand's, and—— A. Would you repeat that?

Q. I say, the ball was on Pete and Hiko's truck, and the hitch, the trailer hitch was on Bill Siebrand's trailer, is that correct?

A. That is right, sir.

Q. Now, how big was the trailer?

A. Twenty-four feet.

Q. Twenty-four feet? A. Feet, yes, sir.

(Testimony of Simeon J. Carroll.)

Q. Is that the length? A. Yes, sir.

Q. A standard highway width, is that correct?

A. Yes, sir.

Q. What was the purpose of it?

A. Concession.

Q. To operate a concession?

A. That is right, yes, sir.

Q. And it belonged to Bill Siebrand, as far [187] as you know? A. Yes, sir.

Q. Now, I believe you stated Bill asked you to take it over there? A. He did, sir.

Q. If you weren't a truck driver, do you know why he asked you to take it over there?

A. Well, I guess maybe he had something else to do.

Q. Had you contemplated any association with Bill Siebrand? A. Yes, sir.

Q. What?

A. Well, I was going to operate the bird store.

Q. Speak a little louder.

A. I was going to operate the bird store for him.

Q. You were going to operate a bird store for him? A. Yes, sir.

Q. Where were you going to operate it, on what kind of a thing? A. In Mesa.

Q. Was it in connection with a theater or show?

A. It was going to be on Siebrand's shows. [188]

Q. Going to be on the Siebrand shows?

A. Yes, sir.

Q. And did you have an interest in the trailer?

(Testimony of Simeon J. Carroll.)

A. You mean did I own part of it, or something?

Q. Yes. A. No, sir.

Q. Did you have a deal with him, or did you contemplate having a deal with him?

A. We were talking about I was going to operate the bird store for him, yes.

Q. What is a bird store?

A. It is a concession.

Q. What is a concession?

A. It is different games, you know, merchandise.

Q. What kind of birds?

A. Well, I had parakeets and canaries and finches.

Q. And did you work for Bill Siebrand?

A. No, sir.

Q. Did you intend to work for Bill Siebrand?

A. Well, I was going to operate that store for him.

Q. On what basis? A. Commission.

Q. Like what?

A. Well, that is the way always concessions [189] operate. They operate on commission.

Q. What kind of deal did you think you were going to work out with him?

A. Well, there was talk that I get 50 per cent, and he get 50 per cent after expenses.

Q. And where was Bill Siebrand on the day you went out and hitched his trailer onto the wrong truck? A. That I don't know.

Q. Did you see him later that day?

(Testimony of Simeon J. Carroll.)

A. Yes.

Q. Where did you see him? A. In Mesa.

Q. And was the Siebrand show in operation in Mesa at the time of the accident? A. No, sir.

Q. Had the Siebrand show been in operation anywhere in 1953?

A. No, sir, not that I know of.

Q. Had this bird store concession trailer been in operation anywhere in 1953, that you know of?

A. No, sir.

Q. What was in the trailer? Excuse me. I think I asked you how long it was and how wide it was. What was the nature of it? What was it made of?

A. You mean the body? [190]

Q. Yes. A. Aluminum.

Q. Aluminum? A. Yes, sir.

Q. Was it reinforced in any way?

A. You mean, was there something over the aluminum, you mean, or what?

Q. Well, over it or under it?

A. It had a frame, sure.

Q. What was it made of?

A. Sir, I couldn't tell you that. It was metal, but I didn't—

Q. Did you examine the contents of the trailer?

A. Do you mean do I know what was in it?

Q. Yes. A. Yes, sir, I do.

Q. Whose property was in it?

A. Bill Siebrand's.

Q. Was any of it yours?

A. No, it was not.

(Testimony of Simeon J. Carroll.)

Q. Any of it Hiko or Pete's?

A. No, it was not.

Q. Any of it belong to Siebrand Brothers Circus and Carnival, operated by Hiko or Pete?

A. No, it was not.

Q. What was in it? [191]

A. Just a bird cage and different frames for the concession.

Q. What kind of bird cage?

A. It is what you use to keep the birds in, an aviary.

Q. An aviary? A. Yes.

Q. How big is it?

A. You don't mind if I think a minute, do you? I think it is about six feet tall, and it is about fourteen feet long.

Q. And what is it made out of? A. Wire.

Q. Were there any birds in it? A. No, sir.

Q. What else, if anything, was in the trailer?

A. Well, there was nothing else, so far as weight was concerned.

Q. Anything on the walls in there?

A. Yes, there was a mirror. There was a mirror back of the aviary, you know, to reflect the birds back out.

Q. You heard this policeman say that he looked into the trailer, and it was filled with rides and concessions, is that correct? A. No, sir. [192]

Q. Did you hear him say that?

A. Yes, sir, I did. The trailer itself is a concession. There was no rides whatsoever in it.

(Testimony of Simeon J. Carroll.)

Q. It didn't have any concessions in it, did it?

A. Only the trailer itself, is all it was, a concession.

Q. The trailer itself is operated as a concession when you get to where you are going?

A. Yes, sir.

Q. How is that accomplished? How do you make a concession out of it from a trailer?

A. Well, the sides of it open up, you know, just open straight up and out and make like awnings. You have seen tents that opened up and make a concession. Well, the side of this trailer opened up and made awnings, and the concession was inside.

Q. And the bird cage was inside?

A. Inside of there, yes, sir.

Q. Now, did you go into business with Bill Siebrand, or anything of that sort, on the day of the accident?

A. If I understand the word partner, I never was partners with him, and I was not in business with him, because we hadn't even started.

Q. Did you operate the bird concession, the bird cage concession in the next five or six days or [193] so?

A. It was in the last of the week, over in Mesa, when we got started, because we didn't have any birds.

Q. Did you have a deal with Bill Siebrand on the day you were going to Mesa to operate the thing?

A. We had no definite deal, but we were talking.

(Testimony of Simeon J. Carroll.)

Q. What time did you see Bill at Mesa?

A. Well, I can't tell you the truth exactly what time it was, because that was the day of the accident.

Q. Did you buy the birds?

A. No, sir, I didn't.

Q. Who bought the birds?

A. Bill Siebrand.

Q. And you say the birds didn't come?

A. No, sir.

Q. Do you know where they were bought?

A. Well, it was a friend of his was supposed to bring them. She was visiting, and supposed to be bringing them from California. I don't know what happened. They were late coming in.

Q. Eventually, later you did go into a deal with Bill Siebrand on operating a concession for him?

A. Yes, sir.

Q. In this trailer? [194] A. Yes, sir.

Q. And was it this concession, then, the concession that you went into, or you were talking about before the accident?

A. Well, we changed it around several times after we even got it opened.

Q. Then you did make a deal with him after the accident? A. You mean a definite deal?

Q. Toward the last of the week? A. Yes.

Q. This was on Friday that the accident occurred? A. Yes, sir.

Q. Now, do you recall the officer testifying he gave you a ticket because there were no safety chains on the truck? A. I do, yes, sir.

(Testimony of Simeon J. Carroll.)

Q. He said that you heard him say that.

A. Yes, sir.

Q. And at the time you got the ticket, do you know what it said?

A. Do you mean do I know just exactly what it said on there?

Q. What did he charge you with?

A. To tell the truth, sir, I don't just [195] exactly remember.

Q. What became of it?

A. I guess they have it over there. I don't know.

Q. Did you have a trial, or anything of that sort?

A. No, I put up a ten-dollar bond.

Q. A ten-dollar bond? A. Yes, sir.

Q. You heard the officer say that he asked you what your occupation was, and you said truck driver for Siebrand, or some such thing as that. Do you recall his saying that from the stand here?

A. You are talking about here?

Q. What did happen over there with regard to that? Tell us that.

A. You mean when the trailer broke loose?

Q. Let me ask you again. A. Yes.

Q. From the stand here you heard the officer say that he asked you what your occupation was, and you said, "I am a truck driver for Siebrand's," or something like that? Something to that effect?

A. Yes, sir.

Q. You heard him say that?

A. Yes, sir. [196]

Q. Is that true?

(Testimony of Simeon J. Carroll.)

A. Yes, he said it right here.

Q. Now, is it true? A. No. I am not.

Q. Did you have any conversation with the officer about your occupation? A. Yes, sir.

Q. What was said by you, and what was said by him? Excuse me. Where did it take place?

A. On the bridge at Tempe.

Q. Near the accident? A. Yes, sir.

Q. And do you know of anybody else that was listening beside you and him?

A. No, sir, I don't.

Q. What was said by each of you?

A. Well, to start with, after the accident, and we started to getting traffic away, why, I went up to him and introduced myself, and I told him that I was the driver, and what should I do?

And he said to take the pick-up and get it off of the bridge, and to come back. So then I came back, and he asked me if I had a driver's license, and I told him no.

Q. I can't hear you very well.

A. He asked me if I had a driver's license, [197] and I told him no. And he asked me was I with the show, and I told him yes.

Q. He asked you if you were with the show? Is that what you said? A. Yes, sir.

Mr. Raineri: Speak a little louder. You answered yes? Your answer was yes?

The Witness: My answer was yes.

Mr. Raineri: When he asked you if you were with the show?

(Testimony of Simeon J. Carroll.)

The Witness: Yes. And he asked me what I did, and I told him I was a concessionnaire.

Then after I come back, then they had taken the trailer and put it across the street over there, so we went over and looked at the trailer. And the first thing then I discovered that the hitch was broken, and I told him the hitch was broken.

And so then we started to look for it to see if we could find some piece that was missing, you know, and he didn't look very hard, it didn't seem to me like he did.

Q. (By Mr. Wilson): Did you go with him?

A. Yes, sir.

Q. Where did you go?

A. Just on the bridge. [198]

Q. Just on the bridge? A. Yes.

Q. Go ahead.

A. I guess that was about all. He gave me a ticket.

Q. Did he tell you he had been following you?

A. Oh, yes, sir. Yes, sir, he did.

Q. Did you have a driver's license of any kind?

A. No, sir. I had an operator's license, but I didn't have it with me.

Q. Was it a chauffeur's license?

A. No, sir.

Q. Do you know what happened to the trailer hitch? A. Well, it broke loose.

Q. Did you have any unusual occurrence on the way over with the trailer and the truck other than this? A. No, sir.

(Testimony of Simeon J. Carroll.)

Q. You heard him testify you were going about 25 miles an hour?

A. That was not what he told me when the accident happened. He told me I was going twenty. That is one thing I definitely remember, yes, sir.

Q. What had been your rate of speed at [199] other times on the way?

A. I tried to drive very careful, the same way.

Q. You didn't encounter any difficulty of any kind? A. No, sir.

Q. Was there any indication to you that there was anything wrong with the trailer hitch on the way over there? A. No, sir.

Q. Did you notice anything occurred just before the accident that could have caused the trailer hitch to come apart, or break, or fail?

A. No, I do not, I did not.

Q. Tell us how you were going, how you were riding along? Tell us what happened?

A. All of a sudden I just looked in the rear view mirror, and I seen the trailer going across the highway. So that was just all there was to it, just like that, and I stopped, naturally.

I went over and it looked like these people's car was getting on fire, and I tried to get somebody to get them out. That was the first thing I was interested in.

Q. Did you do anything that could be termed as negligent or careless, or reckless?

A. No, sir, I did not. [200]

(Testimony of Simeon J. Carroll.)

Q. On the way over there, or at the time of the accident? A. No, sir.

Q. You said you inspected the ball and the hitch, both, before you put them on? A. I did.

Q. Did you fail to do anything, as far as you know, that would have prevented the accident?

A. No, sir.

Q. Of course, you didn't know the Gossnells at all? A. No, sir, I didn't.

Q. The officer said he thought that Gossnell was dead. Did you think he was badly injured?

A. Well, I was scared, if you want to know the truth.

When I seen the accident, and the car was smoking, and the man and lady were inside the car, and there was people gathered around the car, just like that, and they were all standing there, and I wanted to get the man out of the car.

That was my first thought, was to get him out. Then when we got him out was when I seen the officer, after we got the man out of the car.

That is why I was surprised when he said he was behind me, because he told me at that [201] time he was radioing for an ambulance.

Q. Did you see any of the Siebrands before you left the scene of the accident?

A. Yes, sir.

Q. Which one, if any?

A. Peter Siebrand.

Q. Is that this one by me? A. No, sir.

Q. Which one is that?

(Testimony of Simeon J. Carroll.)

A. That is his son.

Q. His son? A. Yes, sir.

Q. Is he called "Little Pete"? A. Yes, sir.

Q. And about when did he come upon the scene of the accident, or when did you first encounter him after the occurrence of the accident?

A. You mean the time?

Q. Yes.

A. I can't be definite in it, but I would say about ten minutes.

Q. And was he travelling with you in any way?

A. No, sir.

Q. What kind of a vehicle was he in, if you know? A. I don't even know. [202]

Q. Did you see him later that day? I don't mean later that day; I mean later at the accident; did you see the vehicle he was in?

A. No, sir; I don't think I ever did.

Q. Did you have any conversation with Peter Siebrand, meaning Little Pete, at that time?

A. Yes, sir.

Q. Was anybody else present within hearing?

A. There was a crowd around there, yes.

Q. As far as you know, could you name anybody that could have heard? A. No.

Q. Was he on the ground, or where was he?

A. He was on the bridge.

Q. What was said between you?

Mr. Raineri: I will object to that, your Honor, anything that was said between him and Peter,

(Testimony of Simeon J. Carroll.)

Junior. That is hearsay, and it might be self-serving, and everything else.

The Court: Sustained.

Q. (By Mr. Wilson): As the result of any conversation that you had with Peter Siebrand, did he help you? A. Yes, sir.

Q. What did he do?

A. I asked him if he got it all straightened [203] out, if he would take it on in, because I was nervous.

Q. You mean the trailer and truck?

A. Yes, sir.

Q. And did he? A. Yes, sir.

Q. And how did you go to Mesa, if at all?

A. I rode with him.

Q. And what did he drive?

A. He drove the pick-up, the trailer.

Q. And pulled the trailer?

A. That is right.

Q. Did you repair the trailer before you went?

A. Yes, sir.

Q. The trailer hitch, I mean?

A. Yes, sir.

Q. Was the officer present at any of that time?

A. You mean—I don't know just what you mean.

Q. When you were repairing the trailer and getting ready to go? A. No, sir.

Q. When did you first learn that you had gotten the wrong truck?

A. When Little Peter came in on the bridge.

(Testimony of Simeon J. Carroll.)

The Court: We will have our afternoon recess at this time. [204]

Keep in mind the Court's admonition.

(A short recess was had.)

The Court: You may proceed.

Q. (By Mr. Wilson): Had you been with Siebrand shows before? A. Yes, sir.

Q. And what did you mean by that expression?

A. Well, I was on the show.

Q. How? How were you on the show?

A. I was working on the show.

Q. How? A. I was working concessions.

Q. On salary? A. No, no salary.

Q. How did you get paid?

A. Commission.

Q. Who paid you?

A. The party you work for.

Q. Who did you work for?

A. Well, most of the time I was working for myself. I did a concession of my own.

Q. How many other years had you been on Siebrand's show?

A. The first time I was on the show was in 1948.

Q. And had you been on there after 1948? [205]

A. Yes. I was up in Alaska for a couple of years. Then I was back on his show.

Q. Now, how long have you been a concessionaire?

A. Well, the first show I was on was in 1948.

Q. And does a concessionnaire have a contract

(Testimony of Simeon J. Carroll.)

with the circus or the carnival that he is connected with? A. I have never seen one.

Q. And what was the usual deal? What is the deal that you had made when you were on this show for yourself?

Mr. Raineri: I will object to that, your Honor, back in 1948. That is so remote that it has no bearing here on the issues involved here.

The Court: It probably wouldn't have.

Mr. Wilson: I am sorry. I couldn't hear you.

The Court: It probably wouldn't have that far back.

Q. (By Mr. Wilson): When was the last time you were on this show prior to the accident?

A. I don't know if I can tell you the exact date, but it was in 1952.

Q. The season of 1952?

A. Yes, sir, the latter part of the season. [206]

Q. Did you have your own concession, or did you work for Bill?

A. No, I had my own concession.

Q. You never worked for Bill before?

A. No, sir.

Q. Did you rent space from Pete and Hiko?

A. Yes, sir.

Q. How did you pay for the space?

A. Well, it is different in different fairs, what we call the fairs, and still dates, and different towns is different prices.

Q. Well, approximately?

A. It would be so much a foot, and you give up

(Testimony of Simeon J. Carroll.)

a per cent of what you gross, like, say, for instance, that your concession was ten feet. Then you would pay for the ten-foot, say, \$2.00 a foot, or whatever it was, and then a per cent.

Q. How often did you pay the \$2.00?

A. Well, you have to pay it every week.

Q. Every week? A. Yes, sir.

Q. How often did you pay the per cent?

A. Every week.

Q. And what was the per cent?

A. Twenty-five.

Q. And did you pay any rent? [207]

A. That was rent. That was what you paid.

Q. Did they participate in your show in any way whatsoever? A. No, sir.

Q. In the operation of the show?

A. You mean my concession?

Q. Yes. A. No, sir.

Q. And did they participate in the losses, if you had a bad week?

A. No. You still had to pay your footage, but if it was a bad week, you didn't pay your percentage, because you didn't have no percentage.

Q. Did they participate in the profits?

A. Well, yes. As I said, you give them a per cent, yes.

Q. You said that was of the gross, not of the profits? A. Yes, of the gross.

Q. All of the money you took in, you paid this rent of 25 per cent? A. Over a footage, yes.

Mr. Raineri: I object. He put that word right

(Testimony of Simeon J. Carroll.)

in his mouth. He said profits before. Now he is trying to get him to say rent.

Mr. Wilson: Let us have the reporter read [208] where he said it was rent, and not I.

The Court: Start over again.

Mr. Wilson: Excuse me, Judge.

Q. (By Mr. Wilson): You now make your living as a concessionnaire, is that right?

A. Yes, sir.

Q. Did you show any interest in these people after the accident?

A. Well, I was very much concerned, yes.

Q. Did you do anything for them, or inquire about it?

A. I didn't sleep for one night, if you call that worrying about it.

Q. Did you do anything about it?

A. I went out to Tempe Hospital, yes, sir.

Q. When was that?

A. You mean the exact date?

Q. Yes, approximately.

A. Well, the only way I can tell you the exact date is it was the day I went over to Tempe, and then went out to the hospital.

Q. What did you go to Tempe for?

A. The police station.

Q. What for? A. For this accident. [209]

Q. Then you went to the hospital?

A. Yes, sir.

Q. Who was with you?

A. You were, and Mr. Siebrand, and your sec-

(Testimony of Simeon J. Carroll.)

retary. I don't know her name. I don't remember her name now.

Q. Anybody else? A. No, sir.

Q. Was I your lawyer?

A. At that time, yes, for this accident you were.

Q. When had you met me?

A. Well, personally, I don't think I had ever met you. I had always heard of you through the showmen's club, because when I first joined the club, I was told you were their attorney.

Q. Now, we went to the hospital. Who went in the hospital, if anyone?

A. There was Mr. Siebrand, and your secretary, and myself.

Q. And did you encounter the Gossnells in the hospital? A. Mrs. Gossnell, yes.

Q. Mrs. Gossnell? A. Yes.

Q. Did you see anybody else in the hospital, or [210] in the vicinity on that day?

A. Well, there was quite a few people, yes, sir.

Q. Anybody you knew? A. No, sir.

Q. I was going to ask you, did you see Mr. Mahoney?

A. I didn't know him at that time, sir.

Q. Did you see him?

A. Yes, I seen him, but I didn't know him at that time.

Q. Did you talk to Mrs. Gossnell?

A. Yes, sir.

Q. Where?

A. It was in—I don't know whether you call

(Testimony of Simeon J. Carroll.)

it a waiting room or a little corridor in the hospital.

Q. Anybody with you at that time?

A. Mr. Siebrand, and your secretary.

Q. Anybody else? A. No, sir.

Q. Was Mr. Gossnell present? A. No, sir.

Q. Had you inquired about him?

A. Yes. That was the thing I wanted to find out about.

Q. Did you go to see him? [211]

A. No, sir.

Q. You heard Mrs. Gossnell tell of the conversation between herself and you and Mr. Siebrand, and Dorothy Dalton.

Would you relate to us what the conversation was by each party?

A. Well, when we went in, and she was not—they had to send for her.

Q. For whom? A. Mrs. Gossnell.

Q. Yes?

A. And when she came out, why, Mr. Siebrand talked with her a few minutes. Then he introduced me to her, and I wanted to find out how her husband was, and how she was.

Q. Do you know the words that were used?

A. The words?

Q. Well, you heard her say that Mr. Siebrand said, "This is Mr. Carroll, the driver, the man who drove the truck for us"?

A. No, sir, that was not the words.

Q. What were the words?

(Testimony of Simeon J. Carroll.)

A. He said, "This is Mr. Carroll, the driver of the truck."

Q. Are you sure of that?

A. I am positive of that, sir; yes, sir. [212]

Q. Was that true? A. Sure, it is true.

Q. Mrs. Gossnell was courteous to you?

A. Yes, sir, she was. But it seemed like she was a little aloft, and it kind of hurt me, too, because, I mean, because it certainly was not intentional, or anything.

Q. She was not very friendly, is that what you mean? A. Towards me, no, sir.

Q. She didn't say anything?

A. No, sir, she did not.

Q. Did she carry on any further conversation with you, other than to say hello?

A. No, sir, she didn't.

Q. What, if anything, was asked of her by either Dorothy Dalton or Mr. Siebrand?

A. Well, after I stood there for a minute, sir, I went over and sat down, so the conversation they had, I don't know.

Q. Did you go to see her after that?

A. No, sir.

Q. Did you hear about how they were getting along? A. Yes, sir, I did.

Mr. Wilson: You may examine. [213]

(Testimony of Simeon J. Carroll.)

Cross-Examination

By Mr. Raineri:

Q. Well, Mr. Carroll, on this particular day, February 20, 1953, you weren't employed by anybody then, according to your testimony.

A. No, I was not. But I was expecting to be.

Q. I say, though, you weren't employed by anybody, were you? A. No.

Q. And if P. W. Siebrand, or Hiko Siebrand would ask you to drive for them, you would have done it just as well as for anybody else?

Mr. Wilson: I object, as assuming something that is not in evidence, not based on any fact that is before this jury or this Court.

The Court: Yes.

Mr. Raineri: I am cross-examining.

The Court: I don't think it is proper.

Mr. Raineri: I am just asking.

The Court: I ruled on the objection.

Q. (By Mr. Raineri): You weren't employed, then, by anybody, as you testified? Is that right?

A. No, sir, that is right.

Q. You were hanging around the show?

A. I was anticipating going to work, yes, [214] sir.

Q. Like you testified, you were anticipating going to work? A. Yes, I was.

Q. And you had been with that show before, so you were familiar with it? A. Yes, I was.

(Testimony of Simeon J. Carroll.)

Q. And you knew all of the parties——

Mr. Wilson: Did you finish your answer? You said, "Yes, I was." Do you mean you were familiar?

The Witness: Yes, I am familiar with the circus.

Q. (By Mr. Raineri): And you knew all of the parties? You were acquainted with P. W. Siebrand and Hiko Siebrand? You knew them well?

A. Yes, sir.

Q. In fact, you had more dealings with them than you had ever had with William Siebrand before, is that right?

A. I was booked on Mr. Siebrand's show; so far as coming into personal contact, I guess I come into personal contact more with Bill than anyone else.

Q. You really had your dealings with Hiko Siebrand and P. W. Siebrand before?

A. Yes, sir. Well, I never had any dealings with [215] Hiko. They were always with P. W.

Q. P. W.? A. Yes.

Q. And all your business relationship before that had been with P. W. Siebrand?

A. That is right, sir, yes, sir.

Q. Now, when you went over to the hospital, William Siebrand was not with you, was he?

A. No, sir.

Q. And P. W. Siebrand was with you, wasn't he? A. That is right.

Q. And when P. W. Siebrand said to Mrs. Gossnell, he said, to use your words as you gave them; you said that Mr. Siebrand said, "This is the man that was driving the truck," is that right?

(Testimony of Simeon J. Carroll.)

A. That is right, yes, sir.

Q. He didn't say this was the man that was driving the truck for William Siebrand, his nephew? He didn't say that, did he?

A. No, sir.

Q. And William Siebrand was not even there, was he? A. No.

Q. Now, as far as chains on that truck, you didn't have any safety——

Mr. Wilson: I object as being immaterial. [216]

Mr. Mahoney: Immaterial? It is very material.

The Court: He may answer.

Q. (By Mr. Raineri): You didn't have any safety chains on that truck at all, did you?

A. No, sir, I did not.

Q. And you don't know what the relationship between William Siebrand, the nephew, and P. W. Siebrand or Hiko Siebrand was at all, do you?

Mr. Wilson: I object as being immaterial.

The Court: He may answer.

Q. (By Mr. Raineri): You don't know what the relationship was between them?

A. I don't know what you mean.

Q. I mean their business relationship?

A. No, I don't have anything to do with their business.

Q. One more question. Your attorney in this case is Mr. Gibbons, isn't that right?

A. Yes, sir.

Q. It is not Mr. Wilson? A. That is right.

Mr. Raineri: That is all. [217]

(Testimony of Simeon J. Carroll.)

Redirect Examination

By Mr. Gibbons:

Q. Mr. Carroll, calling your attention again to the time that you hooked up this trailer and truck on the lot on East Van Buren Street, can you say positively that you secured that trailer hitch as it should have been, that is, with the pin in the top?

A. Yes, sir.

Mr. Mahoney: I object to that on the grounds it calls for a conclusion. It is improper redirect.

Q. (By Mr. Gibbons): Just tell the jury how you hooked it up.

Mr. Mahoney: Still improper. Same objection.

The Court: He may answer. What I would like to know is where it was broken. I haven't heard anything about that.

Go ahead.

Q. (By Mr. Gibbons): Will you just tell the jury, Mr. Carroll, how you hooked it up?

A. Well, I backed the truck up under it, and backed it up, just like you have seen in the hook-up here, and that is the only way I know to [218] explain it.

And I checked everything. I even checked the tires, walked around the trailer and looked at the tires.

Q. And do you remember whether or not you hit any bumps in driving the truck and trailer, before you got to the bridge?

(Testimony of Simeon J. Carroll.)

A. There is quite a few bumps coming off of the lot on Van Buren, and coming into the street also, sir.

Q. What size are those bumps, ruts, or whatever they may be, coming off the lot?

A. Well, they probably vary. I mean with the water, if you understand what I mean. They usually have some quite, you know, holes there. Of course, I think they try to keep it filled in, or something.

Q. Did these bumps or ruts cause you any trouble in your driving with the truck and trailer?

A. No, sir.

Q. Did you have any trouble at all in your driving the truck and trailer as you proceeded along Van Buren Street toward the Tempe Bridge?

A. No, sir, I did not.

Q. Did you have any reason to think that you might have trouble?

A. No, sir, I did not. [219]

Q. Did you have occasion to see the policeman who was driving behind you as you came upon the bridge, or entered the bridge?

A. No, sir. That was a surprise to me. I didn't even know he was behind me.

Q. Do you know how fast you were driving?

A. I know what he told me. I know I was driving carefully. He told me I was going 20 miles an hour, less than twenty-five, right off.

Q. Are you able to say yourself what speed you were driving when you came upon the bridge?

A. With the accident, and everything, definitely

(Testimony of Simeon J. Carroll.)

I couldn't say it, no; I mean, to put it down to the exact miles an hour, no. I know I was driving less than twenty-five.

Q. Would you say slow or fast?

A. I was driving less than twenty-five.

Q. Mr. Carroll, did you have occasion to look at the trailer hitch after the accident occurred?

A. Yes, sir, I did.

Q. Will you tell the jury what you saw?

A. Well, after the ambulance came and took them away, they got a wrecker, and they pulled the car out, and they put the trailer on the other side, so in the meantime they was directing traffic.

And I went and introduced myself to [220] the officer, and told him who I was.

So then we went over to the trailer, and I discovered it was broken, and I told the officer. And he said, "Let's see if we could find the parts." And we looked around a little, and didn't find no parts, and he said to get it off the highway, and the wrecker taken it off and put it in, I don't know what you call it. I guess it was the city pound, I guess, or something. The city had something to do with it.

Q. Did you see what part was broken, Mr. Carroll?

A. Yes, sir, I guess you would call it the lock, the bolt that goes down through it, anyway.

Q. By the lock, you mean which part of it?

A. I meant the front part, sir.

Q. (Indicating.) This part?

(Testimony of Simeon J. Carroll.)

A. That is right.

Q. That was completely broken, is that right?

A. That is right.

Q. Do you know what caused it to break?

A. No, sir, I don't.

Mr. Gibbons: That is all.

Recross-Examination

By Mr. Raineri:

Q. This car was coming on its [221] right-hand side of the road, the Gossnell car?

A. You mean on their right-hand side?

Q. Yes. A. Yes.

Q. And they were travelling at a reasonable rate of speed?

A. Sir, I couldn't give you any idea of their speed, but I am sure they were.

Mr. Raineri: That is all.

Mr. Wilson: Step down.

(Witness excused.)

Mr. Wilson: I will call Mr. Kelly.

OWEN KELLY

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name, Mr. Kelly.

A. Owen Kelly.

Q. What is your business?

A. Manager and operator of the Auto Safety House.

Q. What is that? A. It is a garage.

Q. With a fancy name. Do you know Bill Siebrand? [222] A. Yes, I do.

Q. Did you ever do any work for him?

A. Yes, sir.

Q. What did you do?

A. Well, we have done a little bit of everything, including anything from repairing to building him a trailer chassis.

Mr. Wilson: May this be marked for identification?

The Clerk: Defendants' Exhibit F for identification.

(Said document was marked as Defendants' Exhibit F for identification.)

Q. (By Mr. Wilson): I hand you Defendants' Exhibit F for identification, and ask you if you know what it is?

A. This is one of our job tickets.

Q. Who is it for? A. Bill Siebrand.

(Testimony of Owen Kelly.)

Q. On what is it?

A. Building tanden, axle, trailer chassis.

Q. Did you put a hitch on it? A. Yes, sir.

Q. That is a job that you did for them?

A. Yes, sir.

Q. This is the job ticket? [223] A. Yes.

Q. Does it have the hitch on there?

A. Yes, sir.

Q. What kind is it? A. H-co, Hadco.

Q. Hadco, is that what you call it?

A. That is right.

Q. I show you Defendants' Exhibit E in evidence, and ask you if you know this to be a Hadco hitch, such as was put on there?

A. It is a Hadco hitch.

Q. Is that the kind that was put on there?

A. Positively.

Q. Is there another kind? Was there another kind of Hadco hitch?

A. Yes, sir, there is. There is one other type.

Q. I show you Defendants' Exhibit C for identification, and ask you, is this a trailer hitch?

A. It is.

Q. Is it a common trailer hitch? A. It is.

Q. Is this Hadco here, Defendants' Exhibit E in evidence, a common trailer hitch?

A. It is the most popular in the west. [224]

Q. For what kind of trailer?

A. All kinds of house trailers, stock trailers, utility trailers.

Q. Have you had any trouble with it?

(Testimony of Owen Kelly.)

A. No.

Q. Have you seen this hitch before?

A. That hitch?

Q. Yes. A. It looks like one of ours.

Q. Did we get it from you this morning?

A. Yes, sir, you did.

Q. Now, when this hitch is on a trailer, and a trailer is travelling, this jack is not on the trailer, is that it? A. Generally not.

Q. Can it be, if you get it up high enough?

A. What was that?

Q. I say, you can travel with it if you have it up high?

A. Yes. They carry them sometimes, when they are completely up.

Mr. Wilson: I offer that invoice in evidence.

Mr. Raineri: No objection.

The Clerk: Defendants' Exhibit F in [225] evidence.

(Said document was received in evidence and marked as Defendants' Exhibit F.)

Q. (By Mr. Wilson): Referring to Defendants' Exhibit F in evidence, Mr. Kelly, when did you build this trailer?

A. According to this work, we would have started it on December 11th, 1950.

Q. Is there anything to indicate when it was finished?

A. No. But very often it takes a month to complete one, because we don't have an assembly line. We just build them as per direction.

(Testimony of Owen Kelly.)

Q. Now, in your operation, your company sells these hitches, does it not? A. Yes.

Q. Do you have the exclusive agency for them?

A. No, sir, we do not, but we sell quite a few of them.

Q. You buy them from the manufacturer and sell them yourselves?

A. Yes. And then we use them in our own trailers.

Q. Assuming that you put this on there sometime during the month of January, 1951, would that be correct? [226] A. That would be right.

Q. And that this trailer had received normal use by 1953, February 20, 1953, was there any necessity in your mind of replacing the hitch if no defects were apparent?

A. No, they should last much longer than that.

Q. Do they ever replace them if they aren't broken? A. Not unless they have been broken.

Q. They could eventually wear the ball, I assume?

A. Oh, yes, balls are sometimes replaced. Generally, though, because it may not fit in good with each trailer hitch they have to buy another one.

Mr. Wilson: That is all.

Cross-Examination

By Mr. Raineri:

Q. How much wear there was on this particular trailer hitch you wouldn't know, would you?

A. No, sir.

(Testimony of Owen Kelly.)

Q. It could have been worn and the ball worn and in defective condition, and as far as you were concerned, you wouldn't know, would you?

A. No, sir.

Mr. Raineri: That is all. [227]

Redirect Examination

By Mr. Wilson:

Q. If the ball were worn, and the ball didn't break off of the trailer, would you say the ball was in defective condition——

Mr. Raineri: He says he doesn't know.

Q. (By Mr. Wilson): I say, assuming the ball was not worn, and it didn't break off, the ball didn't break off of the truck at all?

Mr. Raineri: I object to that.

The Court: You have had your assumption.

Q. (By Mr. Wilson): The testimony here, Mr. Kelly, is that an accident occurred, and that the trailer hitch broke, as far as anybody knows.

The officer said it didn't break. He said it had a hole in it, it had threads in it, but the operator of the truck said that the thing broke. and the trailer came off, and he had no indication of it.

Can this trailer hitch break? Can it break?

A. Yes, sir. It is mechanical. It can break.

Q. It can break and let the trailer loose?

A. Yes, if it would break, it would be the [228] end of that.

Mr. Wilson: That is all.

Mr. Raineri: That is all.

(Witness excused.)

Mr. Wilson: I call William Siebrand.

WILLIAM SIEBRAND

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name, please.

A. William Siebrand.

Q. I hand you Defendants' Exhibit G for identification, and ask you if you have seen this document before?

A. Yes, sir. It is the title to my trailer.

Q. Now, I hand you Defendants' Exhibit F in evidence, and ask you if this Defendants' Exhibit F in evidence is the invoice for this same trailer?

A. Yes, sir.

Q. And is that the title for this trailer that is mentioned in the invoice?

A. Yes, sir.

Q. Is that the trailer that is involved in this accident? [229]

A. Yes, sir.

Mr. Wilson: I offer Defendants' Exhibit G in evidence.

Mr. Mahoney: We have no objection.

The Clerk: Defendants' Exhibit G in evidence.

(Said document was received in evidence and marked Defendants' Exhibit G.)

Q. (By Mr. Wilson): Where were you on February 20, 1953, at the time of the occurrence of this accident?

A. Mesa.

(Testimony of William Siebrand.)

Q. Do you know Simeon Jelkes Carroll?

A. Yes, sir.

Q. Has he been on the Siebrand show that belongs to Hiko and Peter Siebrand?

A. He operated a concession of his own.

Q. Do you have any interest in, or did you on the 20th day of February, 1953, have any interest in Siebrand Brothers Circus and Carnival?

A. No, sir.

Q. Do you know of your own knowledge who on that day was the owner of Siebrand's Carnival and Circus?

A. P. W. Siebrand and Hiko Siebrand.

Q. They are your uncles? [230]

A. Yes, sir.

Q. And what is your business?

A. I have this concession.

Q. What business did you have on that day, the 20th of February?

A. I was not doing nothing that day. I was in Mesa.

Q. Had you ever worked for Hiko and Pete on the show? A. Yes, sir.

Q. Had you worked for them prior to the time of the accident? A. Yes, sir.

Q. How close to the time of the accident?

A. Oh, it was about two days—the day before.

Q. Had you been working for them some time before that? A. Yes, sir.

Q. Where? A. In their winter quarters.

Q. Doing what?

(Testimony of William Siebrand.)

A. Building stuff, building trailers, repairing, work on my own stuff.

Q. Had you made a transaction or a deal with Carroll prior to the day that he took the trailer over there? [231]

A. We was going to operate this bird store in partnership when we got the birds in, but they never come in yet.

Q. Did you talk to him about it?

A. Yes, sir.

Q. Did you ask him to bring the trailer over?

A. Yes, sir.

Q. Has Pete or Hiko Siebrand any interest in that trailer? A. No, sir.

Q. Have they ever used that trailer for their own use, in any way whatsoever? A. No, sir.

Q. Did they buy the trailer for you?

A. No, sir.

Q. Have they ever participated as an owner or partner in the operation of the trailer as a concession? A. What is that again?

Q. Have Hiko or Pete ever participated as an owner or operator in the trailer as a concession?

A. No, sir.

Q. Have you operated that trailer as a concession, or had it operated on their show?

A. Yes, sir.

Q. How many times? [232]

A. Three years.

Q. At what part of the year does their show operate?

(Testimony of William Siebrand.)

A. From March, from February or the first of March until November.

Q. And where does it operate?

A. In the western states, New Mexico, Arizona, Texas, Colorado, Utah, Idaho, Montana.

Q. And you operated this show yourself on their show, this trailer? A. No, sir.

Q. Did you have somebody else operate it for you? A. Yes, sir, partnership.

Q. But it was not Carroll? A. No, sir.

Q. What was this trailer termed as?

A. Bird store.

Q. And did you see the trailer when it got to Mesa? A. Yes, sir.

Q. When had you last seen the trailer before it got to Mesa?

A. I saw it, I think, the night before.

Q. Do you know its contents the night before?

A. There was nothing in there but an aviary and [233] a mirror.

Q. What is an aviary?

A. Bird cage, large cage for birds.

Q. And did you see inside of it when it got to Mesa? A. Yes, sir.

Q. Was it any different than it was the night before? A. No, sir.

Q. Was it skinned up a little?

A. It had a few holes in the front.

Q. How much?

A. Oh, about five, six holes in it, some about

(Testimony of William Siebrand.)

four or five inches in diameter. I think there was one larger than that, about a foot.

Q. When was the last time you had moved this trailer yourself? I mean, approximately?

A. I don't know. Maybe the day before, a couple of days before.

Q. What were you doing with it?

A. Getting it ready, painting it.

Q. I mean, when was the last time you pulled it with a motor vehicle on the highways?

A. On the highway?

Q. Yes. A. It was in the fall. [234]

Q. When in the fall?

A. I think it was around the first of November when we come in, in 1952.

Q. And where did you keep it on the lot?

A. We kept it right there where we keep all the trailers.

Q. A lot of other people have trailers there?

A. A lot of other people have trailers and house trailers.

Q. You mean concession trailers and house trailers?

A. Concession trailers and independent trailers.

Q. Do Siebrand Brothers, or did at that time—I don't mean from the standpoint that they were not in business on that day, the last time they operated prior to the accident, and the first time they operated after the accident, did Siebrand Brothers, as Siebrand Brothers Circus and Carnival, operate any concessions or things of that type of their own?

(Testimony of William Siebrand.)

A. No, sir.

Q. Now, what on this show constitutes the general run of concessions? A. What kind?

Q. Yes. [235]

A. Various kinds. Some with darts, ball games, throwing milk bottles, galleries, shooting galleries, eating stands, race horse game.

Q. None of which belonged to the Siebrand Brothers, I mean, Hiko and Pete? A. No, sir.

Q. Do you know of any one who has any interest in Siebrand Brothers' show other than Hiko and Pete? A. I do not know of any one.

Q. And about how many concessionnaires, would you say, were on the show the year before the accident and the year of the accident, after the accident?

A. It was about, it ranged all the way from twenty-five to fifty, sixty.

Q. Do you know of the arrangement that was made with them whereby they came upon the show?

A. What was that again?

Q. Did they have any arrangement with Hiko and Pete about being on the show?

A. You mean these concessionnaires?

Q. Yes.

A. No. When they get there they are there. If they are not there, they are just not there.

Q. What do you mean by that?

A. They just set them there and rent them [236] the space when they come there, when they get ready to set up the show.

Q. Where is that?

(Testimony of William Siebrand.)

A. At each fair, each town they come into.

Q. Do they have any contract with them at all?

A. No, sir.

Q. Do Hiko and Pete pay them to be there?

A. No, sir. They rent on footage, and rent on a percentage basis.

Q. What is that?

A. On footage, pay so much a foot, plus percentage. It depends on what fair they are playing. Some fairs have more, some less.

Q. Why is that?

A. They have to pay more for their fair. Arizona Fair had about 300 concessions out there.

Q. How long have you been around the carnival and circus?

A. Oh, a good many years. I grew up on it for a while. Then I went into the Army, and went back into it again after the Army.

Q. Did it change any, the arrangement between the owner and the concessionnaires?

A. Not that I noticed of any, I didn't see no difference.

Q. How did you move this bird store [237] trailer the year before, the last time you dragged it upon the highway yourself?

A. With my own Ford pick-up. I got a red Ford pick-up.

Q. On the day of the accident, where was your red pick-up? A. It was on the ground.

Q. Where? A. On East Van Buren.

Q. Where on East Van Buren?

(Testimony of William Siebrand.)

A. In the winter quarters lot.

Q. What was it doing?

A. Just sitting there. He was supposed to take that Ford and put it on that trailer, which belongs to the trailer.

Q. And what happened?

A. I guess he took the wrong truck, wrong pick-up. He took the show pick-up instead of mine.

Q. Do you have authority? Did you have authority on that day to have authorized Mr. Carroll to have driven Pete's and Hiko's truck?

A. No, I don't have no authority over their trucks.

Q. When did you have a conversation, if ever, with him that resulted in his taking this trailer from the lot? [238]

A. The day before we went over there, the day before he drove over there with it.

Q. Did you go into business with Mr. Carroll on the day of the accident?

A. No, sir.

Q. On the following day?

A. When we got over there, we was going to have this bird store. The birds never come.

Q. You intended to do it?

A. Yes. Later on; the birds never come, so we put another game in there.

Q. How much later?

A. Five days later.

Q. You did finally go into business with him five days later?

A. Yes, sir. Partnership.

Q. What were the terms of the partnership?

A. Fifty-fifty, after the expenses.

(Testimony of William Siebrand.)

Q. Did he operate the show for you some length of time?

A. The concession, you mean, the bird store?

Q. Yes. A. Yes.

Q. How long have you known Mr. Carroll?

A. Oh, I have known him since 1948.

Q. And he had not had an arrangement with you [239] by operating your concession a week prior to this accident? A. No, sir.

Q. Do you know personally whether or not Pete and Hiko, or any other carnival owner, shares in the losses of the concessionnaires?

A. No, I don't.

Q. You mean you don't know, or do you know they don't?

A. I know they don't. Most shows are operating about the same way, just like a Safeway Store, and business places that work on a percentage rental basis. It has been going on for years.

Q. Do the concessionnaires participate in the profits of the show that they are on?

A. No, sir.

Q. Now, did you have a sign on this trailer?

A. I got, "Siebrand Brothers Circus and Carnival" on there, a sign there.

Q. Is it a sign?

A. Just like Coca-Cola does with some of them.

Q. Who put it on there? A. They did.

Q. Who did?

A. Siebrand Brothers, as an advertising.

Q. How did that come about? [240]

(Testimony of William Siebrand.)

A. Well, they just put it on there, just like Coca-Cola does.

Q. Where does Coca-Cola put their sign?

A. They put them on—I know stands that have them on for them, they paint them for them.

Q. You mean concessions?

A. Concessions, yes.

Q. Who paints them for them?

A. The company puts them on for them.

Q. And the circus painted this sign on there?

A. Yes, sir.

Q. On your trailer? A. Yes, sir.

Q. They paid for it? A. Yes, sir.

Q. Do you remember when it was put on there?

A. No, I don't. I think it was on in 1952. I don't know if it was repainted in 1953 or not.

Q. Did that give them any ownership in your trailer? A. No, sir.

Q. In your business? A. No, sir.

Q. Are you in anyway engaged in a partnership with Hiko and Pete? A. No, sir. [241]

Q. Were you on that day? A. No, sir.

Q. Was Hiko and Pete's circus and carnival operating on that day? A. No, sir.

Q. Do you know when they first operated that season? A. They opened on Saturday.

Q. Do you know whether or not you move your concession in concert with their trucks when the show moves? A. No.

Q. Or whether you move independently?

(Testimony of William Siebrand.)

A. The show takes care of their trucks, and all the concessionnaires take care of their own stuff.

Q. Do you have a trailer house?

A. Yes, sir.

Q. And where was it parked?

A. On the winter quarters lot.

Q. On the day of the accident?

A. Yes, sir.

Q. You have an automobile that pulls it?

A. Yes, sir.

Q. And when you move from one place, when you did move from one place to the other during the [242] season prior to the accident, and the season after the accident, did you move the house trailer, too? A. Yes.

Q. Did you live in it? A. Yes, sir.

Q. Is that common? A. Yes, sir.

Q. Do you have a hitch on it?

A. Yes, sir. Practically all show people live in house trailers.

Q. You went over and got this thing at the Auto Safety House this morning, didn't you?

A. Yes, sir.

Q. This Defendants' Exhibit D, and that is the same thing that was on your trailer?

A. Yes, sir.

Q. Same kind exactly? A. Yes, sir.

Q. Is it ordinary to have this hole exposed with the threads in it when it is in operation, when the trailer is in use?

A. You mean when it is towing it?

(Testimony of William Siebrand.)

Q. Towing it.

A. No. You don't need it when you are towing it. It is just for jacking up when you park.

Q. You put the jack in when you park? [243]

A. Yes, sir. Or you can leave it in there, just so it don't stick down there.

Q. If you have it up high? A. Yes, sir.

Q. When this trailer got to Mesa, was this jack in there on that day? A. No, sir.

Q. What did you finally do about a trailer hitch on this trailer? A. We replaced it.

Q. Are you familiar with that type of hitch?

A. Yes, sir.

Q. Is it common?

A. It is a common hitch.

Q. Did you look at that hitch at any time when you were readying the trailer for the season of 1953?

A. Well, it was all right a couple of days before there. I didn't notice it right at the time it was hooked up, because I wasn't there.

Q. Have you had trouble with trailer hitches?

A. No, sir.

Q. On your trailers? A. No, sir.

Q. What was the condition of the hitch two days before when you looked at it last? [244]

A. It was all right.

Q. Was it two days before?

A. About two days.

Q. Anything wrong with it?

A. No, sir, not that I know of.

Q. Do you know of your own knowledge after

(Testimony of William Siebrand.)

the truck got to Mesa, that Pete and Hike's truck got to Mesa, did you look at the ball on the truck to see if there was anything wrong with it?

A. No, I didn't.

Q. Bill, are you one of the defendants in this action? A. No, sir.

Q. Have you ever seen any papers?

A. No, sir.

Q. Do you know anything about who is suing who? A. Through reading about it.

Q. Nobody served you with anything?

A. No, sir.

Q. Have you at any time been questioned about this matter, other than on the stand here?

A. No, sir.

Q. Anybody take your deposition?

A. No, sir.

Q. Have you concealed yourself from process in any way? [245] A. No, sir.

Q. Did you tell anybody this trailer belongs to anybody else but you?

A. Most of them know it is my trailer.

Q. But neither the plaintiff nor his counsel have questioned you on it at all? A. No, sir.

Mr. Wilson: That is all.

(Testimony of William Siebrand.)

Cross-Examination

By Mr. Raineri:

Q. You testified that you share in the gross profits with Siebrand Brothers, is that right?

A. No, I don't. I give them a rental, percentage rental.

Q. Didn't you use the word "profits" when you testified?

A. No, sir.

Q. You said you share in the profits?

A. No, sir.

Q. You didn't use that word at all?

A. No, sir.

Q. When you run your concession stand and you take some money, is that called a profit?

A. No, sir.

Q. That is not called a profit? [246]

A. No, sir. That is your expense. You got to pay out your rent there, and then you get the profit. The show don't get the profit.

Q. You don't work for any profit at all, do you?

A. Yes, sir.

Q. Where does the profit come from?

A. If there is any profit left after we pay the rent and expenses, if there is any left we get the profit.

Q. You make a gross profit?

A. What do you mean, gross profit?

Q. I mean, do you take any money in?

A. We take money in, sure. And we pay out the

(Testimony of William Siebrand.)

expenses, and we pay the rent for the privilege of sitting at the carnival, or the fair.

Q. You do take in a gross profit, and you split?

A. We don't take in no gross profit.

Q. Do you share 25 per cent of what you take in with Siebrand Brothers? A. No, sir.

Q. You don't share that with them?

A. No, sir. We pay them a rent.

Q. You have never been near Mr. and Mrs. Gossnell, have you? [247] A. No, sir.

Q. In fact, you never tried to get in touch with them in any way, did you? A. No, sir.

Q. You were on the grounds, on the winter grounds, you testified before, on the 20th day of February, 1953, weren't you?

A. No, sir. I didn't testify that.

Q. You weren't on the grounds that day?

A. The day before I was over in Mesa, the day of the accident.

Q. Had you been over on the grounds here on Van Buren?

A. I have been on the grounds. Sure, I have been there.

Q. Your trailer was parked there?

A. I lived there.

Q. You lived there, is that right?

A. Yes. But I was in Mesa before the accident happened.

Q. But you had been there earlier that day, hadn't you?

A. Early in the morning, yes.

(Testimony of William Siebrand.)

Q. Now, in fact, according to your own testimony here today in court, you weren't in business at all on the 20th day of February, 1953. [248]

A. No, we had to go to Mesa first to be in business.

Q. I say, you didn't have any concession of any kind, then, because you didn't have any birds, isn't that right? A. That is right.

Q. Now, you have been born or you are a nephew of Hiko Siebrand and P. W. Siebrand, aren't you?

A. Yes, sir.

Q. And you have testified here that you have been born and raised with that circus or carnival?

A. I was not born and raised with them. I have been off and on, and I went in the Army.

Q. Prior to the time you were in the Army, ever since you were a boy, you were with this show?

A. No, sir, I was with other shows.

Q. Were you with this show?

A. Sure, I was with this show.

Q. Now, if Hiko Siebrand or P. W. Siebrand at any time would ask you to let them use your trailer, you would let them use it, wouldn't you?

Mr. Wilson: I object as assuming something not in evidence.

The Court: Yes. We are interested in this particular day. [249]

Mr. Raineri: If I ask him that question and restrict it to that particular day, would that be all right?

The Court: Yes.

(Testimony of William Siebrand.)

Q. (By Mr. Raineri): If they had asked you that particular day, the 20th of February, 1953, to use your trailer, you would have let them use it, is that right?

Mr. Wilson: I object as immaterial.

The Court: He may answer.

Q. (By Mr. Raineri): Would you?

A. I don't know.

Mr. Raineri: All right. That is all.

Mr. Wilson: What was that answer?

The Witness: I don't know.

Mr. Wilson: Read the question.

(The record was read as requested.)

Mr. Wilson: That isn't the answer you made?

The Court: I didn't hear it.

The Witness: I said, I don't know.

Mr. Mahoney: He said, "I don't know." That is the answer he gave.

Mr. Raineri: That is all.

Mr. Wilson: That is all.

(Witness excused.) [250]

Mr. Wilson: I will call Joe Steinberg.

JOSEPH STEINBERG

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows.

Direct Examination

By Mr. Wilson:

Q. State your name.

A. Joseph Steinberg.

Q. What is your business, Mr. Steinberg?

A. I am a concessionnaire.

Q. Do you know Pete and Hike Siebrand?

A. Yes, sir.

Q. How long have you known them?

A. Oh, I know him for probably 20 years.

Q. Do you know Siebrand Brothers Circus and
Carnival? A. Yes, sir.

Q. Are you on that show now?

A. I am at present, yes, sir.

Q. How long have you been on it?

A. I have been off and on for the last five years. I travel, I am with the Siebrands maybe for five or six weeks. If a good spot comes up in a different part of the country, I hook up my trailer to my truck and move on to a different spot. [251]

Q. Were you on there in 1953?

A. In 1953, yes, sir.

Q. And did you show at Mesa in 1953?

A. Yes, sir.

Q. Were you on there in 1952?

A. I was on there in part of 1952.

Q. Are you familiar with the winter quarters

(Testimony of Joseph Steinberg.)

of the Siebrand Brothers Circus and Carnival here in Phoenix?

A. Yes. As a matter of fact, I left my equipment there last winter.

Q. Have you left it there before that?

A. Oh, yes, time and again.

In fact, winter quarters of a show is always regarded as a courtesy for the concessionnaire.

If I happen to finish the season with any particular show that I had my concession on, and it was too far from my home base, which is Los Angeles, why, I would leave the equipment there, because in the spring we usually open with the show we close with, and then as the season goes on, when the different fairs and celebrations start, we go on to wherever we think we can do best.

Q. Are you a regular concessionnaire?

A. Have been for 40 years.

Q. What kind of a concession do you [252] operate?

A. At present I have got a race horse game. It is a game where the individual players roll balls, and the balls drop into the hole, and it makes the horse go, and the first horse that crosses the finish line wins the race, and it costs a dime to play.

Q. Is that in a trailer?

A. That is in a trailer, yes, sir.

Q. Do you have any other trailers?

A. No, I just have got the one trailer, and the truck.

Q. You don't live in a house trailer?

(Testimony of Joseph Steinberg.)

A. I don't any more. I am getting a little too old, and I stay in motels, now.

Q. During the 1952 season, prior to this accident on February 20th, while you were with Siebrand Brothers Circus and Carnival, what arrangement did you have with them with regard to the payment of anything?

A. I had the same arrangement with them the same as I have with anybody else, that that particular spot they got 25 per cent of the gross receipts as rental.

The other spots we pay a flat rental, maybe \$50.00, \$30.00 a week.

At a fair like Pomona, or your State [253] Fair here in Arizona, you will pay a rental of from seventeen to twenty-five dollars a front foot.

Mr. Mahoney: If the Court please, I would like to interrupt the witness to ask what is the materiality of this?

The Court: I don't know.

Mr. Mahoney: I will object to this line of testimony.

The Court: I will sustain it.

Q. (By Mr. Wilson): What arrangement did you have, Mr. Steinberg, with the Siebrands for the year 1953?

Mr. Mahoney: Same objection, for the same reason.

The Court: He may answer.

Mr. Mahoney: He is a third party here.

The Court: I know.

(Testimony of Joseph Steinberg.)

The Witness: I paid them, as I said, at different spots—at some spots I paid them \$50.00 a week, a flat rental, and then at the various fairs and celebrations, some fairs were \$2.00 a foot plus 25 per cent for rental, and at another spot like——

The Court: Why are we going all through that again?

Q. (By Mr. Wilson): Were you operating, were you in [254] business on February 20th? Were you showing some place on February 20th, 1953?

A. February 20?

Q. Yes.

A. Was that the week of the Mesa Fair?

Q. Where did you first open?

A. I was showing at the Mesa Fair, and I believe that is about the date.

Q. You started at the Mesa Fair?

A. Started at the Mesa Fair, yes.

Q. Did Siebrand Brothers participate in your profits from your concession?

A. Nobody but my wife participates in my profits.

Q. Do they direct you in the hiring and firing, or operation of the game?

A. A concessionnaire is called an independent concession.

The Court: Say yes or no.

The Witness: No.

Q. (By Mr. Wilson): Do you participate in any of the profits of Siebrand Brothers Circus and Carnival? A. No.

(Testimony of Joseph Steinberg.)

Q. Do they participate in your losses? [255]

A. Absolutely not.

Q. Haven't been able to get them to?

A. No.

Mr. Wilson: You may examine.

Mr. Mahoney: No questions.

Mr. Raineri: No questions.

(Witness excused.)

Mr. Wilson: I call Hiko Siebrand.

HIKO SIEBRAND

called as a witness in behalf of the defendants, have been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. You are Hiko Siebrand?

A. That is right.

Q. You are a brother to Pete?

A. That is right.

Q. And you are an uncle to William?

A. That is right.

Q. You are an owner of Siebrand Brothers
Circus and Carnival? A. Yes, I am.

Q. How long have you been so?

A. Ever since its beginning.

Q. And what are your duties in it? [256]

A. I am the bookkeeper.

Q. The bookkeeper? A. Yes.

Q. You keep the money, too, don't you?

(Testimony of Hiko Siebrand.)

A. Try to.

Q. Where were you on February 20th?

A. I was home. I was sick.

Q. How long had you been home sick?

A. Well, I was laid up a couple of years. I had them heart attacks, and I was not in action until——

Q. Do you know Mr. Carroll? A. Yes.

Q. Did you know him before February 20, 1953?

A. Yes.

Q. Had he been a concessionnaire on your show?

A. Yes, as far as I know, yes. That is all I have ever known him to be.

Q. I am sorry, I didn't hear you.

A. That is all I have ever known him to be, a concessionnaire.

Q. Has he ever been an employee of Siebrand Brothers Circus and Carnival? A. No.

Q. Prior to or on February 20, or thereafter?

A. Never. [257]

Q. 1953? A. Never.

Q. Has he ever done anything for you on a contract? A. Never.

Q. Has he ever driven a truck for you?

A. No.

Q. Did anyone ask you for consent for Simeon Jelkes Carroll to drive a red pick-up belonging to you and Pete on the 20th day of February, 1953, for the purpose of hauling Bill Siebrand's trailer to Mesa, or for any other purpose? A. No.

Q. Does Bill Siebrand have your tacit, or actual

(Testimony of Hiko Siebrand.)

consent, did he have it around February 20, 1953, to use a red pick-up that belonged to you and Pete?

A. No.

Q. Didn't he ever have it? A. No.

Q. Do concessionnaires drive your trucks?

A. No.

Q. Do you ever haul concessionnaire's equipment for them? A. No.

Q. Do you travel in caravan, or any other [258] type of—— A. Convoys?

Q. Convoys with concessionnaires?

A. Yes.

Q. You do travel your own equipment in convoy? A. Yes.

Q. How many trucks do you and Pete have to carry the circus?

A. About 35 trucks and trailers. Thirty-seven in all.

Q. Do you own any concessions? A. No.

Q. Operate any concessions? A. No.

Q. Did you in 1952 or 1953? A. No.

Q. What was the basis upon which you allowed concessionnaires to come upon your show prior to February 20th, and on February 20, 1953, and after February 20, 1953?

A. Well, it has been stated here over and over, pay rental. At different times, different prices.

Q. Who would they pay the rental to, as a rule?

A. They pay it to the company.

Q. Who in particular? [259] A. To me.

Q. How, in general, is rental determined?

(Testimony of Hiko Siebrand.)

A. Well, rental is——

Q. Maybe I can save time. You heard their testimony here? A. Yes.

Q. Do you disagree in any way with that?

A. No.

Q. Is that correct? A. Yes.

Q. You want to be bound by that testimony?

A. Yes.

Q. When did you first hear of this accident?

A. About in the afternoon.

Q. When did you get out of bed and come back to work on this show?

A. The next week, when we came to Phoenix. It was about twelve days in between there.

Q. And you had been in bed several years, or several months?

A. Well, not exactly in bed, but not in action.

Q. On account of illness? A. Yes.

Mr. Wilson: You may examine. [260]

Cross-Examination

By Mr. Raineri:

Q. Mr. Siebrand, you remember your deposition being taken in this case approximately a year ago?

A. Yes.

Q. Do you remember you were asked questions regarding this matter? A. Yes.

Q. All through your examination on that particular occasion, you never did use the word——

Mr. Wilson: Just a moment.

The Court: That isn't the way to do that.

(Testimony of Hiko Siebrand.)

Mr. Raineri: All right.

Q. (By Mr. Raineri): Referring to your sharing of the money that was taken in, did you on that particular occasion testify that William Siebrand paid 25 per cent to you folks?

Mr. Wilson: Just a moment.

The Witness: I don't know whether I did or not. I don't think so.

Mr. Wilson: Hiko, listen to me. Don't answer a question when I am objecting. Just a second now.

I object to it, your Honor, on the [261] ground that it is not properly put to the man.

The Court: No, it is not.

Q. (By Mr. Raineri): Well, on that occasion when you were——

The Court: Find the place.

Mr. Raineri: Page 20.

The Court: All right, let him read it, and then you ask him the question.

Mr. Raineri: I will ask him the question.

The Court: Let him read it.

Mr. Raineri: All right.

Q. (By Mr. Raineri): Were you asked these questions here on page 20 by Mr. Cracchiolo, the attorney who questioned you at that time?

“Q. What kind of dealings do you have with your nephew, William Siebrand, with direct relation to your show?

“A. Not any different than any of the other ones.

(Testimony of Hiko Siebrand.)

“Q. I want to know just what those are?

“A. He pays a percentage on his concession.

“Q. What percentage does he pay?

“A. Twenty-five per cent.”

The Witness: That has been said here time [262] and again.

Q. (By Mr. Raineri): Well, did you make those answers?

A. He paid twenty-five per cent.

Q. Yes.

A. For the privilege of sitting there.

Q. That is what my question was. And that was your answer at that time, is that right?

A. Yes.

Q. Now, your show, these concessions and your show, they all travel and operate as a unit, isn't that right?

A. Not as a unit, no. They operate individually. They can go to the town I am at, or they don't have to. But the rest of it must go, that belongs to me goes there.

Q. You don't travel, then, as a unit, is that right?

A. Not with those independents, no, no more than tell you to drive that street with your car.

Q. Now, I will let you read this on page 16 of the deposition.

Did Mr. Cracchiolo ask you this question, starting on the bottom of page 15?

(Testimony of Hiko Siebrand.)

“Q. Would you say most of the trailers involved in your particular circus and carnival have names on them? [263] Let us put it that way.

“A. Well, no, they haven’t all got names on it.

“Q. Do you travel as a road unit, sir? You are a road unit, is that right? A. Yes.”

A. Yes, that is, my convoy, my stuff, not somebody else’s.

Q. Did you give that answer at that time?

A. My stuff. Yes.

Q. Now, on page 27, did Mr. Cracchiolo ask you this question?

“Q. Mr. Cracchiolo——”

This is your attorney, Mr. Wilson, questioning you.

“Q. Mr. Cracchiolo asked you if you gave concessionnaires, and particularly Bill Siebrand, William Siebrand, the right to come under the name of Siebrand Brothers Circus and Carnival?

“A. Well, they operate under the show, because we are the only ones that do the advertising. See, no individual does advertising. [264]

“Q. What do you mean by operate?

“A. Well, we operate as a unit, see.”

Did you give that answer?

A. Yes, that is my stuff again, the same question.

Q. But you are talking about William Siebrand?

A. No, I am not. Same question.

Q. Now, on this particular day of March, or February 20, 1953, you weren’t near the grounds at all? You were sick on that day, is that right?

(Testimony of Hiko Siebrand.)

A. That is right.

Q. So as far as you are concerned personally, you do not know what happened at that particular time?

A. No, I don't.

Q. Because you weren't around, you don't know anything about the dealings, or who was driving what?

A. That is right.

Q. Or who had given any directions to do what, is that right?

A. That is right.

Mr. Raineri: That is all.

Mr. Wilson: That is all.

(Witness excused.)

Mr. Wilson: I will call Ralph Horsmann. [265]

RALPH HORSMANN

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name?

A. Ralph Horsmann.

Q. What is your business, Mr. Horsmann?

A. Concessions.

Q. Did you have a concession prior to February 20, 1953, and after February 20, 1953, on the Siebrand show?

A. Yes, sir.

Q. What kind of a concession?

A. Well, I had three different ones, four different ones at that time.

(Testimony of Ralph Horsmann.)

Q. You are also a relative of the Siebrands, aren't you?

A. My wife is a niece of the Siebrands, yes.

Q. But you are not a relative? A. No.

Q. You had four concessions on the show?

A. Yes.

Q. What kind were they?

A. Well, my wife and I have a pop and ice cream stand, and I had a scale and two ball [266] games.

Q. Did you carry each one of these in a separate trailer?

A. Well, I pulled my ice cream and pop stand with one truck.

Q. Was that constituted in one trailer, one of these things where you lift the flaps, and so forth?

A. Yes, one trailer. And my ball games, I hauled them in another trailer.

Q. And your scales?

A. They went in the same trailer as the ball games.

Q. So you had two trailers, is that right?

A. That is right.

Q. And were these trailers—take the one of the food concession, where you sold pop, ice cream, sandwiches, is that correct? A. Yes.

Q. How big a trailer is it?

A. Twenty-four feet.

Q. Standard width? A. Standard width.

Q. And when you got there and screwed down

(Testimony of Ralph Horsmann.)

this jack and let the sides down, you were in business, is that right? A. That is right. [267]

Q. As you went down the highway, were the sides of this trailer solid? A. Yes.

Q. It looked like—— A. A van.

Q. A van. What was painted on the outside of it?

A. Last year I had nothing on the outside of it. This year I have an ad from the Pepsi-Cola Company on the outside of it.

Q. What does it say?

A. "For a light refreshment, drink Pepsi-Cola."

Mr. Mahoney: I will object on the grounds I can't see the materiality.

The Court: I don't either.

Q. (By Mr. Wilson): Does the Pepsi-Cola Company own your concession? A. No.

Q. Own any interest in it? A. No.

Q. Participate in the profits? A. No, sir.

Q. Does it participate in the losses?

A. No, sir.

Q. Does Siebrand Brothers have any interest in [268] your concessions? A. No, sir.

Q. Do they participate in the profits?

A. No, sir, not in the profits.

Q. Do they participate in the losses?

A. No, sir.

Q. Do you pay them a rental? A. Yes, sir.

Q. What kind of a rental?

A. On a basis of 25 per cent on still spots, and some fairs we have to pay footage and 25 per cent,

(Testimony of Ralph Horsmann.)

ranging all the way from a dollar up to seven and a half, ten, different prices, different fairs.

Q. Do you drive their trucks? A. No, sir.

Q. Is there anything about this whole thing other than business? A. No, sir.

Q. Do you know of any concessionnaires who have ever driven any of their trucks?

A. No, sir.

Mr. Wilson: You may examine.

Mr. Mahoney: No questions.

Mr. Raineri: No questions.

Mr. Wilson: That is all. Step down.

(Witness excused.) [269]

Mr. Wilson: I will call Mrs. Ritter.

CORA RITTER

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name. A. Cora Ritter.

Q. What is your business?

A. Concessionnaire.

Q. You are on the Siebrand show?

A. Yes, sir.

Q. How long have you been with them?

A. Oh, on and off possibly seven or eight years.

Q. And you operate your concession in a truck and trailer? A. Trailer.

(Testimony of Cora Ritter.)

Q. What kind of a trailer is it?

Mr. Mahoney: Same objection, your Honor.

The Court: Yes. I think this is becoming a little cumulative, isn't it?

Mr. Wilson: I thought we would shift to a woman, Judge.

The Court: It would be the same.

Q. (By Mr. Wilson): You heard the other testimony, [270] and you have the same arrangement as these other men have, the same arrangement?

A. Yes, sir.

Q. You have been with them for about seven years?

A. Yes, sir.

Q. You don't participate in their profits, and they don't participate in yours?

A. No, sir.

Mr. Wilson: That is all.

Mr. Raineri: No questions.

(Witness excused.)

Mr. Wilson: I will call Peter Siebrand, Junior.

PETER H. SIEBRAND

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. State your name.

A. Peter H. Siebrand.

Q. You are not junior, then?

A. Not quite.

(Testimony of Peter H. Siebrand.)

Q. But Pete Siebrand is your father?

A. Yes. [271]

Q. And he is the Siebrand sitting here beside me?

A. Yes.

Q. Now, do you operate a concession on the Siebrand show?

A. No, I don't.

Q. On the day of this accident, which you have heard us talking about, did you come upon the accident?

A. Yes, I did.

Q. Where?

A. On the bridge going to Tempe.

Q. Where had you come from?

A. I had come from home, or from town. I believe the last time I come from buying parts up town. I was up town.

Q. What kind of a car were you in?

A. I had a pick-up, green pick-up.

Q. Who did it belong to?

A. It belongs to me.

Q. To you personally?

A. Yes.

Q. Where were you going?

A. I was going in the general direction of Mesa.

Q. Did you know that Mr. Carroll was [272] driving this truck that belonged to your father and Hiko?

A. No, I didn't.

Q. Did you encounter him at some place between Phoenix and Mesa?

A. No.

Q. Or did you come up on him on the highway?

A. Just come up on him.

Q. That was after the accident had occurred?

A. Yes.

(Testimony of Peter H. Siebrand.)

Q. And you testified it was then that he had learned that he had the wrong truck?

A. That is right.

Q. And did you help Carroll?

A. Yes, I did.

Q. In what respect?

A. Well, after the trailer had been moved off the bridge, it was moved to the parking lot on the side, and we fixed up the hitch. We fixed the hitch and took it to Mesa.

Q. Now, referring to Defendants' Exhibit D in evidence, this trailer hitch here, is that the kind of hitch that was on it? A. That is right.

Q. And you were with me this morning when we got that from the Auto Safety House?

A. Yes. [273]

Q. Do you know the name of it?

A. No, I don't.

Q. Did you fix the hitch, or have it fixed?

A. Yes.

Q. And you took it to Tempe to do it?

A. Yes.

Q. And then in that condition you took it on to Mesa? A. I did.

Q. And Carroll was with you? A. Yes.

Q. Can you tell what happened to the hitch?

A. Actually, I don't know.

Q. What?

A. I don't know actually what happened to it, how it happened.

Q. What did you do to it to fix it?

(Testimony of Peter H. Siebrand.)

A. I got another piece of iron.

Q. Can you take this hitch and show them what you did to it? Was this a permanent hitch?

A. A temporary hook-up.

Q. You took it there and left it there?

A. Yes.

Q. Did you look at the ball on the truck that day? A. Yes. [274]

Q. Was there anything wrong with it?

A. No.

Q. Show them if you can—there are two or three fellows here that are mechanics—show them what you did.

A. Replaced this part in here underneath (indicating).

A Juror: Was this gone?

The Witness: Yes.

A Juror: Was this gone?

The Witness: Yes.

Q. (By Mr. Wilson): And then you went into a blacksmith's shop, or something there?

A. Yes.

Q. And got the thing fixed? A. Yes.

Q. Did you know whose truck it was?

A. The GMC?

Q. The truck that was pulling the trailer?

A. Yes, I knew.

Q. Did you know whose trailer it was?

A. I know the general idea. Yes, I do know.

Q. You knew then? A. Yes.

Q. And it belonged to your cousin, Bill? [275]

(Testimony of Peter H. Siebrand.)

A. That is right.

Q. And did Carroll request you to help him?

A. He did.

Q. You left the trailer and Carroll in Mesa? Or do you remember? A. Yes.

Q. Did you see Carroll on that day prior to the time you saw him on the bridge? A. No.

Q. Were you at the lot, at the circus winter quarters lot, on that day?

A. In the morning, yes.

Q. Did Carroll request of you any consent or permission, or anything, to drive this truck?

A. No.

Q. When did you last see the truck before you saw it on the bridge?

A. Well, it was sitting back in the back of the lot.

Q. The winter quarters lot? A. Yes.

Q. Do you know of anyone that had the authority to drive this truck?

A. I don't know. I probably would.

Q. Other than Pete, and Hiko, and you?

A. Yes. [276]

Q. Was Bill's truck there on the lot, too?

A. Well, I couldn't say for sure, because I was up town at the time.

Q. Did Bill keep his stuff on the lot there, too?

A. Yes, he did.

Mr. Wilson: You may examine.

(Testimony of Peter H. Siebrand.)

Cross-Examination

By Mr. Mahoney:

Q. Mr. Siebrand, you say that you happened along on the bridge and saw this accident, is that correct? A. That is right.

Q. You more or less took over the job of getting this trailer over to Mesa, is that correct?

A. I didn't have to do that. The policemen were right there.

Q. You took over the job of getting the trailer over to Mesa?

A. I didn't move it off of the bridge.

Q. You did move it from a place in Tempe over to Mesa, did you not? A. That is right.

Q. And you overlooked and took charge of that operation, is that correct? [277]

A. That is right.

Q. Who are you employed by?

A. By the Siebrand Brothers.

Q. By P. W. and Hiko, is that correct?

A. Yes.

Q. You were the one that took that trailer on from Tempe to Mesa, is that right?

A. That is right.

Mr. Mahoney: That is all.

Redirect Examination

By Mr. Wilson:

Q. Why did you do that?

Mr. Mahoney: I object on grounds it is immaterial, your Honor.

(Testimony of Peter H. Siebrand.)

The Court: He may answer.

Mr. Wilson: I think it is immaterial, too.

Mr. Mahoney: Why ask the question, then?

Mr. Wilson: That is all.

(Witness excused.)

The Court: We will suspend until ten in the morning.

Keep in mind the Court's admonition.

(Whereupon, at five o'clock p.m., an adjournment was taken until ten o'clock a.m. of the following day, April 15, 1954.) [278]

Thursday, April 15, 1954; 10:00 A.M.

(Court convened pursuant to adjournment.)

(Present: Same as before.)

The Court: Call your next witness.

Mr. Wilson: I will call P. W. Siebrand.

P. W. SIEBRAND

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. You are P. W. Siebrand, one of the defendants in this case? A. Yes, sir.

Q. Where do you live, Mr. Siebrand?

A. 2709 North 24th Place.

Q. Is that your home?

(Testimony of P. W. Siebrand.)

A. Yes, sir. [279] That is in Phoenix.

Q. Do you own it? A. Yes, sir.

Q. How long have you lived there?

A. About six years.

Q. Does your brother, Hiko Siebrand, have a home here? A. Yes, sir.

Q. Does he live here? A. Yes, sir.

Q. Where does he live?

A. On Montebello.

Q. Who owns Siebrand Brothers Carnival and Circus? A. Hiko Siebrand and myself.

Q. Does anyone else have any interest in it at all? A. No.

Q. Is it a corporation? A. No.

Q. Is it a partnership? A. Yes, sir.

Q. Where do you winter quarter the circus?

A. 2307 East Van Buren.

Q. Do you own that property?

A. Yes, sir. [280]

Q. How long have you owned it?

A. About ten years.

Q. Who operates the circus? Who manages it?

A. We both do it together.

Q. What are his duties?

A. He takes care of the office, and I do most general, almost anything.

Q. What does the carnival and circus consist of?

A. The vaudeville and circus consists of riding devices, a circus performance, and some side shows, and we let out on commission or rental basis the concessions.

(Testimony of P. W. Siebrand.)

Q. About how many concessions do you have?

A. It varies from, oh, it might vary from fifteen to—at different fairs it might go up to a hundred, or even more.

Q. How long have you been dealing with concessionaires? A. About 40 years.

Q. Has the basis on which you have dealt with them changed during that time? A. No.

Q. What is the basis upon which you deal with them?

A. Well, it is based on paying a rental fee [281] on a basis of their gross, in some instances. In some instances it is just a flat rental. And other places—it may be at a fair where the fair gets considerable, and these concessions can sometimes do business directly with the fair, themselves, and sometimes they rent space from us.

Q. Was William R. Siebrand a concessionaire upon your show during the year prior to the accident? A. Well, he had been in 1952, yes.

Q. And then after the accident, was he a concessionaire during that season upon your show?

A. Yes.

Q. And he is your nephew? A. Yes, sir.

Q. And does he have any ownership or control of the circus and carnival?

A. None whatever.

Q. Does he participate in the profits in any way?

A. No, sir.

Q. Does he participate in the losses in any way?

A. No, sir.

(Testimony of P. W. Siebrand.)

Q. What kind of a concession did he operate on your show in the year prior to the accident?

A. Oh, they had different kinds of [282] concessions. I don't know whether anybody understands. We had games with dolls, or novelties, or birds.

Q. I am talking about Bill.

A. Yes. He had some birds one year, and he had other things.

Q. In the year prior to the accident, what was the basis of your letting him, or having him on your show?

A. As a concessionaire.

Q. Under the terms which you mentioned in general?

A. Yes.

Q. Did you make, and have you ever made any different deal with William R. Siebrand because he was your nephew?

A. No.

Q. How long has he been back from the army?

A. He came back in the summer of 1946, and he didn't do anything. He was with the show, but he didn't do no—take no part in it one way or other, even with a concession. He was in some trucking business before he went to the army, and he was with the show as a kid way back. But then he was gone about 10, 12 years, and he wasn't here at all.

Q. Was he before the accident an employee of the circus and carnival? [283]

A. No. He helped us sometimes during the winter in repairing.

Q. Where?

A. On Van Buren Street.

Q. Now, on the day of the accident, was Bill Siebrand an employee of the Siebrand Brothers

(Testimony of P. W. Siebrand.)

Circus and Carnival? A. No.

Q. Was he employed by you or Hiko privately for any purpose? A. No.

Q. Were you in business on that day?

A. We hadn't opened the show. We was going to open it the next day.

Q. Where? A. At Mesa.

Q. How long have you been at the Mesa opening, Mesa show?

A. Well, we brought our equipment over there, the rides, they brought them over about Tuesday and Wednesday, and they set them up, and it is always, with the first opening, a lot of work to put them up, so we bring them over early, and we had them all out there about Wednesday.

Q. What kind of a place is that at Mesa? Is that a fair? [284]

A. It is. They call it a fair. They have a big exhibit building there, and a lot where they put on some tents for exhibits.

Q. How many years have you had that fair?

A. Six years, I think, ever since it opened.

Q. Was Bill Siebrand's concession on your show on the day of the accident? A. No, sir.

Q. Was it on your show the day after the accident? A. No, sir.

Q. And later on it was on your show?

A. Yes, sir.

Q. Do you know Mr. Carroll sitting at the table?

A. Yes, sir.

Q. And how long have you known him?

(Testimony of P. W. Siebrand.)

A. Well, I know him first, I think, in 1948. He was on the show with a concession for, oh, maybe four or five weeks, and then he was back again. And then he went to Alaska, was there with a concession a couple of years, and then in the fall he came back from Alaska, and he was with his concession on our show again.

Q. On the day of the accident was Carroll working for you? A. No, sir. [285]

Q. Did he work for you the day before the accident? A. No, sir.

Q. Did he work for you the day after the accident? A. No, sir.

Q. Did he ever work for you? A. No, sir.

Q. By you, I mean you and Hiko, who own and operate the Siebrand Circus and Carnival?

A. No, sir.

Q. Nor you privately or individually?

A. No, sir.

Q. Nor Hiko privately and individually?

A. No, sir.

Q. Was he a friend of yours of any association in particular?

A. Well, other than being acquainted with him and having a concession on our show.

Q. The same as other people? A. Yes.

Q. Did Carroll ever drive a truck for you on the day of the accident?

A. Other than taking this truck that morning. he has not, no.

(Testimony of P. W. Siebrand.)

Q. I didn't understand you. [286]

A. Other than he took that truck by mistake, or wrongfully, on the morning of the accident.

Q. I say, did he drive that truck for you?

A. No, no. Just took it.

Q. Where was the truck?

A. On the ground there.

Q. What ground?

A. 2307 East Van Buren, our circus ground.

Q. What color was the truck? A. Red.

Q. Was it a pick-up truck or flat track?

A. Pick-up red truck, GMC truck.

Q. Did Bill Siebrand have a pick-up truck?

A. Yes. It is a Ford.

Q. Where was it on the day of the accident?

A. On the ground there.

Q. Did you give consent to Carroll to drive this truck to pull Bill Siebrand's trailer?

A. No, sir.

Q. Did anyone ask you for consent?

A. No, sir.

Q. Did you give Bill Siebrand consent to drive that truck? A. No, sir.

Q. Does Bill Siebrand have an understanding—rather, does he have a standing or running consent to [287] drive, to use your trucks? A. No, sir.

Q. I mean, did he at that time?

A. No, sir.

Q. Were you in any wise interested in whether Bill Siebrand's trailer got to Mesa or not?

A. No.

(Testimony of P. W. Siebrand.)

Q. Why not?

A. Well, in the first place, they didn't have it ready.

Q. What do you mean, they didn't have it ready?

A. They didn't have no birds, they said.

Q. He couldn't even have been a concessionaire because he had no way to operate, that is your statement?

A. No, he didn't.

Q. Did you need him on the show?

A. No, sir.

Q. Did you have all the concessioners you wanted at that time?

A. Well, there is no set rule about it. You just have what you have.

Q. When did you first find out that he drove this truck?

A. The first I found out, I was home, and my son called that there had been an accident, and [288] that our truck was in it, that Carroll had taken the truck.

Q. You heard the officer say that he asked Carroll what his occupation was, and Carroll told him that he was a truck driver for Siebrand Brothers?

A. Yes.

Q. Is that true?

A. No, sir.

Q. Do you have any truck drivers who move your circus and carnival?

A. Yes.

Q. Are they solely truck drivers, or do they engage in other activities?

A. Well, they work on the rides.

(Testimony of P. W. Siebrand.)

Q. And as such, exclusively, you don't have any truck drivers? A. No.

Q. Who drives the truck, for example, taking the Ferris Wheel, one of the Ferris wheels from one town to the other?

A. Well, we have the operator of the Ferris Wheel. He generally drives the ride. He operates on the truck. It is not always absolute, because he could be driving another truck, and somebody else would drive the one he had the ride on.

Q. Did you have a sign on Bill's trailer [289] saying Siebrand Brothers Circus and Carnival?

A. Yes.

Q. Did you have such a sign on other trailers that didn't belong to you?

A. Yes, there was several signs on different trailers.

Q. How long have you been doing that?

A. Oh, not very long, maybe four or five years, something like that.

Q. You pay for putting the sign on?

A. We generally pay for the—we have a permanent painter, and we have him put it on there, if they want it on there. If they don't want it on there, we don't put it on.

Q. Do you have any ownership or interest in this trailer involved in this accident?

A. No, sir.

Q. Did you at the time of the accident?

A. No, sir.

Q. Did you ever have? A. No, sir.

(Testimony of P. W. Siebrand.)

Q. Was that trailer parked on the winter quarters? A. Yes, sir.

Q. Are there other trailers parked on the winter quarters? [290] A. Yes, we have.

Q. What kind of trailers?

A. Different trailers, concession trailers, baggage trailers, house trailers.

Q. How big is the winter quarter lot?

A. Five acres.

Q. Do you engage in any sort of community welfare or public work in this community?

Mr. Mahoney: I will object to that on the grounds it is immaterial.

The Court: Yes.

Mr. Wilson: I think it is material from the standpoint, your Honor, of being a foundation for the interest that he showed in the Gossnells, is what I had in mind.

Mr. Mahoney: That is a little remote, your Honor.

The Court: I think so.

Q. (By Mr. Wilson): Did you show an interest in the welfare of the Gossnells? A. Yes, I did.

Q. How long after the accident before you—how long after you heard about it before you started to see them?

A. I was there within two hours. [291]

Q. Where were you when you heard about it?

A. Home.

Q. Had you been on the lot that day?

A. No.

(Testimony of P. W. Siebrand.)

Q. On the winter quarters, I mean?

A. No.

Q. What did you do about the Gossnells?

A. I went to the hospital and I met Mrs. Gossnell, and I talked with her, and asked her if she needed any assistance, if she knew anybody in town of any kind, and if I could do anything for her, I would.

Q. What day was that?

A. The first day. She told me she knew one person, Mr. Clark.

Q. What is his name?

A. Clark. And he was on his way down there, or she had called him.

Q. Down where?

A. To Phoenix, or Tempe.

Q. From where? A. From Tucson.

Q. Did she say who he was? A. Clark.

Q. No, but I mean, he was a friend of theirs, or any relationship with them?

A. That is the only one she said she knew. [292]

Q. Did you see Mr. Gossnell?

A. No. He was not able to be seen that day, is what they told me.

Q. When the accident was reported to you, was he reported in critical condition? A. Yes.

Q. You heard Mrs. Gossnell testify that you saw her on another occasion other than that day?

A. I saw Mrs. Gossnell twice, I think.

Q. Do you know the next time you saw her?

A. I saw her on Thursday.

(Testimony of P. W. Siebrand.)

Q. Which Thursday?

A. The following Thursday.

Q. What day was the accident on?

A. It was on Friday.

Q. Was there more conversation between you and Mrs. Gossnell on the day about this fellow Clark?

A. No, other than that he was coming to Tempe, and she said that he would come over and see me.

Q. Now, when did you first see a lawyer about the accident?

A. When I come back and saw Mrs. Gossnell, I saw Mr. Mahoney and Cracchiolo come from the hospital, out of the building.

Q. That isn't what I meant. I meant, when did you first consult a lawyer about your [293] situation?

A. Immediately.

Q. On the day of the accident?

A. Yes.

Q. And did you conduct any investigation as to the cause and the manner in which the accident occurred?

A. Yes.

Q. When?

A. Friday afternoon and Saturday, as soon as I was available and could come back from the hospital.

Q. Did you see Clark?

A. Yes, sir.

Q. It has been testified there was another man in the car with the Gossnells; did you ever see him?

A. Yes.

Q. When did you see him?

A. I saw him the day of the accident.

(Testimony of P. W. Siebrand.)

Q. Where? A. At the hospital.

Q. Talk to him? A. Yes.

Q. What did you talk to him about?

A. Oh, we just said a few words. He didn't seem to be much interested in anything.

Q. Did you learn who he was, or what he was doing with them, or anything? [294]

A. I understand he was a writer.

Q. Was he there when you were with Mrs. Gossnell? A. No.

Q. Where did you talk to Mrs. Gossnell the first day? A. In the corridor of the hospital.

Q. She came out there and talked to you?

A. Yes.

Q. When did you see Clark?

A. Saturday afternoon he came to Mesa.

Q. Now, was anybody with him?

A. I don't think so. There might have been.

Q. You don't know?

A. I didn't see nobody that I could remember.

Q. Where did you talk to him?

A. He came to the office, but I wasn't in the office, so my daughter took care of the office. They sent for me and I came to the office again.

Q. Where was that? A. In Mesa.

Q. What kind of an office did you have in Mesa?

A. We have got a large trailer office that is built on a semi-trailer.

Q. When you came into the trailer, was he already in the trailer? [295] A. Yes.

(Testimony of P. W. Siebrand.)

Q. And as far as you know, nobody was with him?

A. I can't say there was not. There was quite a few other people, and we got working in the office.

Q. Was Hiko there? A. No.

Q. Where was he?

A. I think he was home.

Q. Now, what did Clark say to you?

A. Well, we just talked about the Gossnells, if they was in distress, or needed anything. There wasn't much more said about the thing.

Q. Can you say what he said?

A. Well, just talked about the accident, and I was sorry that it happened, and I says to him, if we couldn't do anything for them, we certainly would like to do something for them, and I was very much interested that they would get the right kind of medical care, because they were strangers and didn't know nobody in the community.

Q. Had you talked to Mr. Carroll prior to the time you talked to Mr. Clark?

A. No. Very few words.

Q. I mean, had you seen him since the accident?

A. Yes.

Q. Where did you see him? [296]

A. I saw him, I think, in Tempe.

Q. Have you seen this Clark since that Saturday? A. No.

Q. Now, I asked you what he said to you, and you told us something of what you said to him. Now,

(Testimony of P. W. Siebrand.)

was there more that you said to him than what you have told us?

A. No, nothing, only talk about the Gossnells, their welfare. That is about all.

Q. Did he tell you they needed something, or didn't need something?

A. Well, he didn't know. Mr. Gossnell couldn't be talked to, and he finally decided, just leave it go, see what happens.

Q. Did he seem to know the Gossnells well?

A. He indicated that.

Q. Do you know that this Clark's deposition was taken in Fort Dodge a few days ago? A. Yes.

Q. And you know that he wasn't here at the first trial? A. No.

Q. I show you a portion on page 7 of the deposition of Fred Clark, on page 8, rather, wherein Clark says that he said to you: "I understand you wish to see me." [297] A. I didn't say that.

Q. He says he said it when he came in.

A. He might have said that, but I didn't ask him to come.

Q. You didn't ask him to come there?

A. No. But Mrs. Gossnell said he would come to see me.

Q. Then he says that you said: "I do. I am sorry about this accident." A. Yes, sir.

Q. Did you say "I do"?

A. Yes. No, no. He just came in, and he says, "to see about the accident." I says, "I am surely

(Testimony of P. W. Siebrand.)

sorry that that happened." I says, "Are you a friend of the Gossnells?" He says, "Yes."

Q. He says, "I told him Mrs. Gossnell said that you wanted to see me."

A. No. Mrs. Gossnell said he would come to see me.

Q. And he says that you said you were so sorry about the accident, and "he was going to stand all damages and would buy them a new car at once, because theirs was wrecked beyond repair."

A. No, sir.

Q. Did you say anything to that effect?

A. No, sir. [298]

Q. Was there any such conversation?

A. No, sir. We was concerned with Mr. Gossnell, because he might die.

Q. Was there any discussion about whether or not you were liable for the accident?

A. No, sir.

Q. Had you determined prior to this by legal consultation whether or not you were liable for the accident?

Mr. Raineri: I object to that, your Honor. That is self-serving.

The Court: Well, he might have had advice.

Mr. Raineri: It is self-serving. They can say what they want to. It is a conclusion.

The Court: Well, he consulted his counsel and reached a conclusion based on what his lawyer told him.

The Witness: Yes.

(Testimony of P. W. Siebrand.)

Q. (By Mr. Wilson): Have you ever been confronted with any such statement as that from Mr. Clark, in person? A. No, sir.

Q. Were you confronted with any such statement as that in the first trial? A. No, sir.

Q. He says on page 9: "We walked about [299] the circus display, and he said it was just a winter showing of their show, and that they did not start on the summer tour until later in the winter or early spring."

Did you walk about the show with him and say anything of that sort?

A. I don't think we was—I don't think I went out of doors, but we might have talked about the show.

Q. You played this show for six years?

A. Yes, sir.

Q. And is it the first or the last showing?

A. First showing.

Q. Is it a winter showing or a spring showing?

A. Well, it is just a temporary opening of our show.

Q. Do you go on from there?

A. Yes. We reassemble in Phoenix.

Q. He says at page 9, in the center of the page: "He further stated that lawyers shouldn't be brought into the case, as they would settle between the Gossnells and himself."

Mr. Raineri: "They could settle."

Mr. Wilson: Thank you.

Mr. Raineri: Read the whole thing. [300]

(Testimony of P. W. Siebrand.)

Mr. Wilson: Now, let's don't have anything like that.

Mr. Raineri: If the Court please——

Mr. Wilson: I think you were calling my attention to the fact that I made an error.

The Court: Get along with this lawsuit.

Mr. Wilson (Reading): "He further stated that lawyers shouldn't be brought into the case, as they could settle between the Gossnells and himself, as he would stand all damages, and lawyers would drag it through the court for several years."

Q. Did you talk about that with Clark?

A. No, we didn't talk about no lawyers or suits. We were concerned with Mr. Gossnell's injuries, or being ready to die at that time.

Q. Why were you concerned with it?

A. I figured that some way or other I would get involved in it.

Q. How? What do you mean?

A. Because, in the first place, on account of the, of my truck being used in there.

Q. Now, did anybody ever, on the Gossnell side, say to you that—at any other time, either prior, or in this courtroom, or last year, that you had at any time agreed to stand all damages and buy them a new [301] car?

A. No.

Q. Or anything to that effect?

A. No, sir.

Q. Or that you had ever admitted any liability or made any offer of settlement?

A. No, sir.

Q. Now, let's see. This was the day following the accident, is that correct?

(Testimony of P. W. Siebrand.)

A. Yes, sir, afternoon following.

Q. The afternoon of the day following the accident?

A. It is about 24 hours, 26 hours after the accident.

Q. Now, you heard this deposition read into evidence yesterday? A. Yes, sir.

Q. Now, did you see Mrs. Gossnell after you talked to Clark? A. Yes, the next Thursday.

Q. The next Thursday? A. Yes.

Q. Where? A. At the hospital.

Q. Who was with you?

A. Dorothy Dalton and Mr. Carroll. [302]

Q. And did anyone else accompany you to the hospital?

A. Well, you did, but you didn't go inside.

Q. Where had we been?

A. We was to Tempe.

Q. And did you see anybody else at the hospital besides Mrs. Gossnell?

A. I saw Mr. Mahoney, Mr. Cracchiolo, the party that rode in the car with the Gossnells, leaving the hospital.

Q. Now, did you have a conversation with Mrs. Gossnell? A. Yes, very little after that.

Q. Where was it?

A. In the corridor of the hospital.

Q. Who was there?

A. Dorothy Dalton and Mr. Carroll.

Q. And did you say to Mrs. Gossnell that this was Mr. Carroll who was driving the truck?

(Testimony of P. W. Siebrand.)

A. No. I don't even know they ever was introduced. Dorothy Dalton, we all three come in, and she started talking to Mrs. Gossnell.

Q. What about?

A. About the accident, and sorry about the thing happening. We just all three talked.

Q. Well, the question is, did you say this [303] thing to her, that this was Carroll who drove the truck?

A. I told her that was Mr. Carroll that drove the truck.

Q. You said that to Mrs. Gossnell?

A. Yes.

Q. Now, you heard her testify from the stand that she said that you said, "This is Mr. Carroll who drove the truck for us, and I just wanted you to meet him"? A. No, sir.

Q. Did you say anything to that effect?

A. No.

Q. This was Thursday, a week after the Friday, the day that the accident occurred? A. Yes.

Q. How long were you there?

A. Oh, maybe ten minutes.

Q. Did you offer to help them, or ask them if they needed help at that time, or inquire further about their welfare?

A. Yes, I asked them if they was in any need at all, and if they knew they had a good doctor.

Q. Do you know why Dorothy Dalton went over there?

(Testimony of P. W. Siebrand.)

A. I understand that she was acquainted with Gossnells. [304]

Q. That Dorothy Dalton was? A. Yes.

Q. Who was she? Who was Dorothy Dalton?

A. She was your secretary.

Q. Now, did you ever talk to Mrs. Gossnell after that Thursday? A. No.

Q. Did she tell you on that day that Mr. Mahoney represented her?

A. She didn't say nothing.

Q. About that? A. No.

Q. Did she tell you that anybody represented her? A. No.

Q. Did you ever see Mr. Gossnell prior to seeing them in this courtroom? A. No, sir.

Q. Did anyone ever come to you at any time, including Clark, and ask you to make a settlement in connection with this case? A. No, sir.

Mr. Raineri: If the court please, that is a misstatement of the evidence. Mr. Clark didn't ask for any settlement at all. In fact, he never mentioned settlement, his deposition doesn't. That is [305] a misstatement of the evidence.

The Court: It may stand.

Mr. Wilson: I don't know what he is talking about.

The Court: I don't either.

Q. (By Mr. Wilson): Did you ever examine the trailer hitch on Bill's trailer that was involved in the accident, before the accident? A. No.

Q. Did you ever drive the red pick-up truck

(Testimony of P. W. Siebrand.)

that Carroll drove that belonged to you and Hiko that day? A. No.

Q. Have you seen it? A. Yes.

Q. Before the accident, I mean? A. Yes.

Q. You knew you had it? A. Yes.

Q. How many trucks do you have?

A. Thirty-five.

Q. Are you actively, and were you at that time actively in charge of this show, or do you have somebody else run it?

A. No, I am mostly in charge of the show.

Q. I couldn't understand you. [306]

A. I am in charge of the show.

Q. You work there? A. Yes.

Q. When the shows open? A. Yes.

Q. I mean all during the time it is open?

A. Not all the time. Most of the time. I am in active duty either with it or away from it.

Q. Is there anybody under you that has the authority that you have?

A. My brother, or my son.

Q. Hiko? A. Yes.

Q. And Little Pete? A. Yes.

Q. Did Little Pete tell you what he had done about the trailer when he called you up, and about the truck?

A. Yes, he told me that he got it fixed, and he took it to Mesa, and Carroll was with him. He left his car in Tempe, and brought the driver back to drive that.

Q. Do you know of any way on earth that you

(Testimony of P. W. Siebrand.)

are associated with Bill Siebrand to the extent of being liable in any way for the actions of Carroll?

A. No, sir. [307]

Q. Or any way that you are associated with Carroll that would make you liable for his actions?

A. No, sir.

Mr. Wilson: You may examine.

The Court: We will have our morning recess at this time.

(A recess was had.)

The Court: You may proceed.

Cross-Examination

By Mr. Raineri:

Q. Now, Mr. Siebrand, you did go over to the hospital to see the Gossnells, didn't you?

A. Yes, sir.

Q. And you did talk to Mr. Carroll out at Mesa in your office, isn't that right? A. Yes.

Q. And you were over to see the Gossnells more than once? A. Twice.

Q. In the hospital at Tempe?

A. Twice, yes.

Q. And the second time that you went over there, why, you brought your attorney with you, and you also had your attorney bring his secretary with him, isn't that right? A. Yes. [308]

Q. Now, after this accident happened on this particular 20th day of February, 1953, your son, P. W. Siebrand, called you up right away, didn't he?

(Testimony of P. W. Siebrand.)

A. Yes, sir.

Q. And he told you that the accident happened, didn't he? A. Yes, sir.

Q. Now, on those occasions that you went over to see the Gossnells at the hospital in Tempe, you at no time brought William Siebrand, the owner of the trailer, with you, did you?

A. He wasn't there.

Q. I say, you didn't bring him over with you, did you? A. No, I did not.

Q. All right. Now, you made a report of this accident to the State, didn't you, under the financial responsibility act? A. My attorney did, yes.

Q. And you signed it, didn't you?

A. I don't know whether I did or not. I guess I must have.

Q. Yes. You didn't have William Siebrand make any such report, did you, or have him sign that report? A. No, sir. [309]

Q. I show you Plaintiffs' Exhibit 2 so marked for identification, and ask you what that is, if you know? A. That is my card.

Q. And who did you give that card to?

A. I give it to Mrs. Gossnell when I introduced myself to her.

Q. Did you give her this card and tell her, "Have Mr. Clark come over"?

A. No, I said nothing about it.

Q. And, "This is my card"?

A. That is before I knew anything about Clark.

Q. You didn't do that at all? A. No.

(Testimony of P. W. Siebrand.)

Q. Or you didn't give Mr. Clark a card, did you?

A. I don't remember whether I did or not.

Q. Didn't you ask the Gossnells if they had any friends here at all? A. Yes, sir.

Q. And didn't they tell you that they had a friend by the name of Mr. Clark that was coming?

A. Yes. And he would come and see me.

Q. Didn't you tell the Gossnells that you would like to talk to Mr. Clark, and have him come over to see you?

A. Mrs. Gossnell said that Mr. Clark will [310] come and see you.

Q. You didn't ask for Mr. Clark to come over and see you?

A. No. I didn't know who Mr. Clark was, or what he had to do with it.

Q. Is your testimony here now that you did not give Mr. Clark that card?

A. I did not give it to him. I might have given him another one.

Q. But you don't deny that you gave him a card?

A. I gave him a card—I gave a card to Mrs. Gossnell, and if I did give one to Mr. Clark, I gave it to him when he came to see me.

Q. Now, you don't deny that you talked to Mr. Clark over at Mesa in your office?

A. He came to see me, and I talked with him.

Q. And you did have some talk with him there?

A. Yes.

Q. And you didn't tell him there at that time

(Testimony of P. W. Siebrand.)

that you would buy, or stand any damages, is that right? A. No, I should say not.

Q. You didn't have any talk of that kind?

A. No, sir.

Q. You didn't tell Mr. Clark, or did you have any talk with Mr. Clark about equipment of any kind? [311]

A. We talked about the two patients.

Q. No, I am asking you, did you talk to him about—— A. And if they needed assistance.

Q. You are not answering the question. Maybe I didn't make myself clear.

Did you talk to him, Mr. Clark, about any carnival equipment when he was over there at Mesa to see you? Did you talk to him about that?

A. I don't remember that. I wasn't in the office when he came, and I was sent for, and I went to the office. And we sat in the office and we talked about the fair, and different things about Iowa, because I originally came from there, and so did he. And Mr. Clark left, and I did not go with him.

Q. Did you during the course of that talk mention anything about the equipment that was being hauled from Phoenix over to Mesa?

A. I don't remember that.

Q. And didn't you tell Mr. Clark at that time, in accordance with what he said in his deposition, that your equipment was being hauled by that trailer from Phoenix over to Mesa?

A. No, sir.

Mr. Wilson: I object as assuming something not

(Testimony of P. W. Siebrand.)

in evidence. There is nothing in the deposition [312] that says it was Pete Siebrand's equipment.

The Court: Where did you find that?

Mr. Raineri: I have got it here on page—I will find it. Here is a question asked by your attorney——

Mr. Wilson: What page?

Mr. Raineri: Page 9. By your attorney.

Mr. Wilson: Is that the answer to what you are looking for?

Mr. Raineri: Here is one of them. There are two instances of where it was said, and I will find it, too. Here is one, page 9.

Mr. Wilson: What part of page 9?

Mr. Raineri: Bottom of the page.

Mr. Raineri (Reading): “Q. What, if anything, did he say about moving of their equipment at the time, as to the distance they were moving it?”

This question was asked by your attorney in Fort Dodge? A. I don't know him.

Q. (Reading): “The Witness: He talked about the equipment being at the Mesa Fair and was moving it from Phoenix, which is only 15 miles away.”

A. Yes, sir. [313]

Q. Did you tell him that?

A. I don't remember.

Mr. Wilson: I submit that that is not saying that his equipment was being hauled in this trailer.

Mr. Raineri: It sure is.

The Court: No. Well, I can't remember the exact words. He said he didn't make that statement.

(Testimony of P. W. Siebrand.)

Mr. Raineri: He denies it now.

The Court: Yes.

Mr. Raineri: But this witness says they did talk about it.

The Court: Go ahead. Let co-counsel find it. Go ahead with the cross-examination.

Q. (By Mr. Raineri): Page 10, the bottom of page 10:

“The Witness: He repeated several times about how sorry he was about the accident had to happen to the Gossnells with his equipment, and that he would stand all damages, and as I said before, buy them a new car at once, assuming that, I suppose, that Mrs. Gossnell could drive.”

Did you give that answer? A. No, sir.

Q. Now, you are the only one that owns the riding devices, you and your brother? [314]

A. That is right.

Q. In connection with that circus and carnival, is that right? A. Yes, sir.

Q. And you are the one that makes the arrangements for all of the rides or concessions that play under your show with the county at that particular fair grounds, is that right?

A. Yes. Not always. I sometimes have an assistant that does it for me.

Q. You did in this instance, though, did you?

A. Yes.

Mr. Raineri: That is all.

Mr. Wilson: That is all, Mr. Siebrand.

(Witness excused.)

Mr. Wilson: The defendants Siebrand rest.

Mr. Gibbons: If the Court please, in order to save time, may the record show that the defendant, S. J. Carroll, adopts as his defense the testimony of witnesses William Siebrand, Owen Kelly, and, of course, his own testimony?

The Court: All right.

Mr. Gibbons: And the defendant Carroll rests, your Honor, although at this time I would like to move that the deposition of the witness Clark be stricken and the jury instructed to disregard [315] it as to the defendant S. J. Carroll, on the previous grounds of the same motion, your Honor, that it was at a later time that the purported conversation related therein took place, and that the defendant S. J. Carroll was not present.

Mr. Wilson: I renew the same motions as to Hiko Siebrand.

Mr. Gibbons: Nothing in there that could be binding on him.

Mr. Mahoney: Sure they are connected. If the jury decides there is a connection there, this testimony would have probative value.

The Court: I think so. Any rebuttal?

Mr. Raineri: No rebuttal.

The Court: All right. Proceed with your argument.

Mr. Mahoney: We have one instruction.

The Court: Additional instruction?

Mr. Mahoney: Yes.

The Court: Do you have some more?

Mr. Gibbons: Yes, I have some more.

The Court: We will take a few minutes to look at your instructions. We will go in chambers. The Court will stand at recess for a few minutes.

(A recess was had.) [316]

(The following proceedings were had in the Court's chambers, out of the presence of the Jury.)

Mr. Wilson: The defendants, Peter Siebrand and Hiko Siebrand, move for a directed verdict in their favor and against the plaintiff, on the ground that there is no evidence of agency by which the jury could find that these defendants were in any wise liable for the accident that occurred, even if it was not unavoidable. And on the further ground that these defendants have shown by their clear and conclusive evidence, and the only evidence in the case, that Carroll drove the truck without their consent.

Mr. Gibbons: Let the record show that the defendant, S. J. Carroll, joins in the motion.

The Court: Motion denied.

Mr. Wilson: Now the defendants, P. W. Siebrand and Hiko Siebrand, further move the court at this time for ruling upon their objection to the deposition of Clark taken in Fort Dodge, Iowa, on the ground that even if the statements alleged to have been made by P. W. Siebrand are true, they are in no wise binding upon the partnership, nor upon Hiko Siebrand, individually, as they occurred after the occurrence that is the subject of the recovery. [317]

The Court: The motion will be denied. Do you want to join in that?

Mr. Gibbons: Yes. Let the record show the defendant Carroll joined in that motion.

The Court: All right. Motion denied. We will adjourn at this time until 1:30.

(Thereupon a recess was taken until 1:30 o'clock p.m. the same day.)

April 15, 1954; 1:30 o'Clock P.M.

Before Judge Ling and a Jury

(Court resumed pursuant to recess.)

(Present: Same as before.)

The Court: You may proceed with closing arguments.

(Whereupon counsel for plaintiffs and counsel for defendants presented closing arguments to the jury.)

The Court: I will excuse the jury until 9:30 tomorrow morning.

(An adjournment was taken until 9:30 a.m. the following day, April 16, 1954.) [318]

April 16, 1954; 9:30 o'Clock A.M.

(Court convened pursuant to adjournment.)

(Present: Same as before.)

Instructions to the Jury

The Court: It now becomes the duty of the court to instruct you as to the law that applies to this case.

The contentions of the parties, briefly, are these, as you have heard:

The plaintiffs were driving across the Tempe bridge and were struck by this trailer. Now, they claim that the driver of the truck that was drawing the trailer was negligent in the operation of the truck and trailer.

The defendants, on the other hand, the Siebrands, while it was their truck, they claim that Mr. Carroll had no authority or permission from them to drive this truck, and the trailer that you have heard belonged to William Siebrand. [319]

And Mr. Carroll, driver of the truck, claims that the accident was unavoidable.

Briefly, those are the issues.

Now, as I said, the action is predicated on negligence. Negligence is defined in the law as the doing

of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Before negligence can become actionable, it must be the proximate cause of the injury complained of.

Proximate cause is defined in the law as the cause of an injury which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury.

You are instructed that upon the plaintiffs rests the burden of showing by a preponderance of the evidence that it was the negligence of the defendants which caused the injury. Unless plaintiffs [320] make this proof, they cannot recover.

The mere surmise there may have been negligence on the part of the defendant, S. J. Carroll, or the mere fact that an accident happened to the plaintiffs, does not entitle the plaintiffs to a verdict.

You are further instructed that the mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action is negligent. In law we recognize what is termed as an unavoidable or inevitable accident. These terms do not mean literally that it was possible for such an accident to be avoided. It

simply denotes an accident that occurred, without having been proximately caused by negligence.

Even if such an accident could have been avoided by the exercise of exceptional foresight, skill, or caution, still no one can be held liable for injuries resulting therefrom.

You are instructed that the driver of an automobile or truck is not the insurer of the safety of others, and in case they exercise that degree of care for the safety of others which is prescribed by the statute, and such as an ordinarily prudent person would usually use under the same or similar circumstances, then they have discharged their [321] duty and are not lacking in ordinary care.

The section of the Arizona Code provides as follows:

“No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required by this section, and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant, or any person upon the highway.”

You are instructed that if you find from a preponderance of the evidence—preponderance of the evidence as used in these instructions simply means the greater weight of the evidence. You are instructed if you find from the preponderance of the evidence in this case that P. W. Siebrand, Hiko Siebrand, and William Siebrand intended, and did join their efforts in furtherance of the circus and

carnival show to be shown at the Maricopa County Fair in Mesa for their joint profit, then you may find that they were joint adventurers and were jointly and severally liable for the negligent conduct of the defendant Carroll.

I further instruct you that if you find [322] from a preponderance of the evidence in this case that such negligence was the proximate cause of the injuries and damages sustained by plaintiffs George F. Gossnell and Estella Gossnell, or proximately contributed to cause same, then they may recover from the defendants, and your verdict would be for the plaintiffs.

You are instructed that if you find from a preponderance of the evidence that the act of the defendant Carroll in driving the truck and trailer from Phoenix to Mesa was a part of the business enterprise in which P. W. Siebrand, Hiko Siebrand, and William Siebrand were interested, then and in such event you are instructed that P. W. Siebrand, Hiko Siebrand, and William Siebrand were joint adventurers.

You are further instructed that it is immaterial that the particular journey was a single transaction, or that the truck and trailer were owned by P. W. Siebrand, Hiko Siebrand, or by William Siebrand, or by all of them jointly. The use of the truck and trailer as a part of a common business enterprise makes each of them responsible for the manner in which it is operated.

You are instructed that if the purpose of the journey from Phoenix to Mesa by the [323] defend-

ant S. J. Carroll was for the benefit of the owners of the truck or trailer, and for their joint benefit, and as part of a common business enterprise, the owners may under the principles of the law of agency be regarded as the masters of the driver, S. J. Carroll, even though no wages or reward were paid to him.

You are instructed that as between the parties themselves, the relationship of joint adventurers is a matter of intent and arises when they intend to associate themselves as such. There need be no formal agreement particularly specifying or defining the rights and duties of the parties. Such an agreement may be inferred from the conduct of the parties, or from facts and circumstances which make it appear that a joint enterprise was in fact entered into. The consideration for a contract of joint adventure may be a promise, express or implied, to contribute capital or labor to the enterprise.

You are instructed that a duty rests upon every man in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure others, and that if he does not do so, and another is thereby injured, he shall answer for the damages.

You are further instructed that the rule [324] of imputed negligence stemming from a joint enterprise rests upon the relationship of agency existing among persons engaged in a joint or common enterprise, and that the theory upon which the doctrine of joint enterprise rests is that the associates in the

enterprise are partners, or that each is an agent for the other.

You are instructed that we have under the law of this state a rule of evidence known as *res ipsa loquitur*. You are instructed that under and by virtue of this rule that where the thing which caused the injury complained of, in the instant case the truck and trailer driven by the defendant Carroll, is shown to be under the management of the defendants, or their servants, and the accident is such as in the ordinary course of things does not happen if those who have its management or control used proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of care.

In other words, you are instructed that when such circumstances are shown to exist, the inference arises that defendants were guilty of negligence, and in the absence of explanation by defendants, justifies a recovery in damages by plaintiffs for such wrong, provided that you have found that [325] there was a common business enterprise existing among P. W. Siebrand, Hiko Siebrand, and William R. Siebrand.

You are instructed that under the law of this state, proof of ownership is *prima facie* evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner, and is using the vehicle in the business of the owner. And you are further instructed that it is not essential that the agency presumed from

proof of such ownership should be a business agency, or the service a remunerative service.

You are instructed that if you should find from a preponderance of the evidence that the defendants were guilty of negligence, and that this negligence was the proximate cause of the injury and damage complained of, then it will be your duty to go further and assess the damages in this case, and give plaintiffs what will reasonably compensate them, as shown by the evidence, for the injuries and damages sustained. And in arriving at that, you will take into consideration the permanent injuries sustained, loss of wages and earning capacity, pain and suffering, physicians' and nurses' bills, and hospital expenditures, if any; and the pain and suffering and medical expense which plaintiffs [326] in all probability and to a reasonable certainty may endure in the future, if any, taking into consideration age and life expectancy.

The mere fact I have instructed you on the measure of damages is no indication that the court thinks you should return a verdict for the plaintiffs. It is for you to determine who shall prevail in the action.

You are instructed that the creation of an agency relationship arises from the consent of the parties. It is not essential that any actual contract should exist, or that compensation should be expected by the agent, and the assent of the parties thereto may be either express or implied.

An implied agency is an actual agency. It is a fact which is to be proved by deductions or inferences from other facts and circumstances. If the

relationships exist which will constitute an agency. it will be an agency whether the parties understood the exact relationship or not.

You are instructed that when a person suffered injury from the negligent management of a vehicle, it is sufficient prima facie evidence that the negligence be imputed to the defendant, to show he was the owner of the vehicle, without proving affirmatively that the person in charge was [327] the defendants' servant or agent. It lies with the defendant to show that the person in charge was not his agent or servant, leaving him to show, if he can, that the vehicle was not under his control at the time, and that the accident was occasioned by the fault of a person for whose negligence the owner is not answerable.

The burden of proof is cast on the owner to show, if he can, the negligent driver was not his agent or servant.

You are instructed that if you find from a preponderance of the evidence in the case that the truck which was pulling the trailer at the time of the accident was being driven without the consent of the owners, then you must find for the defendants Siebrand and return your verdict accordingly.

You are instructed that an independent contractor is one who carries on an independent employment in pursuance of an agreement by which he has entire control over the work and the manner of its performance, as one who contracts to do a specific piece of work, furnishing his own assistance in executing the work in accordance with either di-

rectly his own ideas, or a plan previously given to him by the person for whom the work is done without being subject to the orders of the latter [328] with respect to the details of the work.

You are further instructed that should you find S. J. Carroll was an independent contractor and not an agent of William R. Siebrand in the operation of the bird store concession, then you must return a verdict for the defendants, P. W. Siebrand, Hiko Siebrand, and Siebrand Brothers Circus and Carnival.

You are instructed that William R. Siebrand was the owner of the trailer involved in the accident, and that the name Siebrand Brothers Circus and Carnival painted on the trailer does not of itself affect the ownership of William R. Siebrand in said trailer.

In judging of the evidence in this case, you are to give it a reasonable and fair construction. You are not authorized because of any feeling of sympathy or other bias to apply a strained construction, one that was unreasonable, in order to justify a certain verdict, and when, were it not for such feeling or bias, you would reach a contrary conclusion.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon the trial.

A witness is presumed to speak the truth. [329] This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character

for truth, honesty and integrity, or his motives, or by contradictory evidence.

In judging the credibility of the witnesses in a case you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable persons.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the parties, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, in every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration [330] of the evidence to the bald expression of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable persons.

There is nothing peculiarly different from the way a jury is to consider the proof in a civil case and that by which men give their attention to any question depending upon evidence presented to them.

First of all, you are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment.

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, any testimony which is ordered stricken out must be wholly left out of account and disregarded. [331]

The opinion of the judge as to any issue in the case is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in the instructions.

After you retire to your jury room, you will select one of your number to act as a foreman, and you will proceed with your deliberations. After you have agreed upon a verdict or verdicts, in the event you do, you will have the verdict signed by your foreman and returned into open court.

Any verdict agreed upon must be the unanimous verdict of the jury.

Forms of verdict have been prepared for your guidance. Omitting the title of the court and cause, one reads:

“We, the Jury, duly impanelled and sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and assess their damages at dollars.”

The other reads, omitting the title of the court and cause:

“We, the Jury, duly impanelled and [332] sworn in the above-entitled action, upon our oaths, do find for the plaintiffs against defendant, S. J. Carroll, and assess their damages at dollars.”

The other form reads:

“We, the Jury, duly impanelled and sworn in the above-entitled action, upon our oaths, do find for the defendants, P. W. Siebrand and Hiko Siebrand, doing business as Siebrand Brothers Circus and Carnival, and against the plaintiffs.”

The Fourth form reads:

“We, the Jury, duly impanelled and sworn in the above-entitled action, upon our oaths, do find for the defendant, S. J. Carroll, and against the plaintiffs.”

Have I omitted anything?

Mr. Mahoney: No, your Honor.

Mr. Wilson: No.

The Court: All right, you may retire in the custody of the bailiff.

(Whereupon at 10:00 a.m., the jury retired to deliberate on its verdict.)

The Court: You may state your objections to the instructions, gentlemen.

Mr. Wilson: The defendants, P. W. [333] Siebrand and Hiko Siebrand, object to plaintiffs' instruction number 20, on the ground that it does not embrace all of the essential elements of the law of agency, nor is it supported by other and adequate instructions. And it has a tendency to mislead the jury by causing them to believe that this would be the only element—that the elements contained in 20 are the only elements of agency.

The defendants, P. W. Siebrand and Hiko Siebrand, object to plaintiffs' instructions on the ground that all of the instructions pertaining to joint adventure and joint enterprise are lacking in the total essential elements to constitute an instruction in connection with the same, and particularly in connection with the failure to state that it is necessary, to constitute a joint enterprise or joint adventure, that the parties must have entered into the same knowingly and voluntarily, and that they must have been liable for participation in the losses of the joint adventure or the joint enterprise.

Specifically, that the defendants, Hiko Siebrand and P. W. Siebrand, object to plaintiffs' instruction number 5 so given by the court, on the ground that it is not supported by critical evidence.

The defendants, P. W. and Hiko Siebrand, [334] except to plaintiffs' instruction number 8 on the ground that it is not a correct statement of the law in such cases made and provided.

Defendants P. W. Siebrand and Hiko Siebrand

object to plaintiffs' instruction No. 11 on the ground that it is not a correct statement of the law, and is not supported by the evidence.

Mr. Gibbons: May the record show that the defendant, S. J. Carroll, joins in all of the objections?

The Court: All right. The court will stand at recess.

(Which was all of the evidence taken and proceedings had on the trial of the above-entitled cause.) [335]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 21st day of July, A.D. 1954.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed July 26, 1954. [336]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of George F. Gossnell and Estella Gossnell, his wife, Plaintiffs, vs. P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Brothers Circus and Carnival, and S. J. Carroll, Defendants, numbered Civ-1875 Phx., on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries and docket entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries and docket entries constitute the record on appeal in said case, as designated in the Appellants' Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Plaintiffs' Amended Complaint.

2. Answer to Amended Complaint of Defendant S. J. Carroll.

3. Answer to Amended Complaint of Defendants P. W. Siebrand and Hiko Siebrand, d/b/a Siebrand Bros. Circus and Carnival.

4. Minute entries of April 13, 14, 15 and 16, 1954 (proceedings of trial).

5. Verdict against Defendants P. W. Siebrand, et al.

6. Verdict against Defendant S. J. Carroll.

7. Plaintiffs' Requested Instructions.

8. Requested Instructions of Defendants P. W. Siebrand, et al.

9. Requested Instructions of Defendant S. J. Carroll.

10. Plaintiffs' exhibits 1, 2, 3, 4, 10, 11, 12, and 13 in evidence. (Plaintiffs' exhibits 6, 7 and 8 transmitted separately by express.)

11. Defendants' exhibits F and G, in evidence. (Defendants' exhibits A, B, C, D, and E transmitted separately by express.)

12. Stipulation that Defendants' exhibits B, C and E for identification be treated as if in evidence.

13. Clerk's Civil docket entry of judgment against Defendants P. W. Siebrand, et al., and of judgment against Defendant S. J. Carroll.

14. Reporter's Transcript.

15. Motion to Strike Portion of Judgment of Defendants P. W. Siebrand, et al.

16. Motion for New Trial of Defendants P. W. Siebrand, et al.

17. Motion for Satisfaction of Judgment of Defendant S. J. Carroll.

18. Minutes entry of May 17, 1954 (order denying motion to Strike portion of Judgment, Motion for New Trial and Motion for Satisfaction of Judgment).

19. Notice of Appeal of Defendant S. J. Carroll.

20. Bond for Costs on Appeal of Defendant S. J. Carroll.

21. Statement of Point on Appeal of Defendant S. J. Carroll.

22. Designation of Contents of Record on Appeal of Defendant S. J. Carroll.

23. Notice of Appeal of Defendants P. W. Siebrand, et al.

24. Bond for Costs on Appeal of Defendants P. W. Siebrand, et al.

25. Order approving Property (Supersedeas) Bond.

26. Supersedeas Bond on Appeal of Defendants P. W. Siebrand, et al.

27. Statement of Points on Appeal, of Defendants P. W. Siebrand, et al.

28. Designation of Contents of Record on Appeal of Defendants P. W. Siebrand, et al.

29. Order Extending Time to Docket Appeals.

I further certify that the originals of Plaintiffs' exhibits 6, 7 and 8 (X-rays) and of Defendants' exhibits A (X-rays), B, C, D and E (trailer hitches, ball joint and jack) have been transmitted sepa-

rately by express, as a part of the record on appeal herein.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$4.00 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 2nd day of August, 1954.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 14468. United States Court of Appeals for the Ninth Circuit. P. W. Siebrand and Hiko Siebrand, Doing Business as Siebrand Brothers Circus and Carnival, Appellants, vs. George F. Gossnell and Estella Gossnell, His Wife, Appellees, and S. J. Carroll, Appellant, vs. George F. Gossnell and Estella Gossnell, His Wife, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed August 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
in and for the Ninth Circuit

No. 14468

GEORGE F. GOSSNELL and ESTELLA GOSS-
NELL, His Wife,

Plaintiffs,

vs.

P. W. SIEBRAND, HIKO SIEBRAND, d/b/a
SIEBRAND BROTHERS CIRCUS AND
CARNIVAL, and S. J. CARROLL,

Defendants.

STATEMENT OF POINTS ON APPEAL

The points upon which appellants, P. W. Siebrand and Hiko Siebrand, will rely on appeal are:

1. The Court erred in refusing to direct a verdict in favor of the above-named defendants.
2. There is no evidence that the defendants, P. W. Siebrand and Hiko Siebrand, were guilty of negligence.
3. The Court erred in that the verdict, decision and judgment are not justified by the evidence.
4. The Court erred in that the verdict, decision and judgment are not justified by the law and are contrary to the law.
5. There is not sufficient or substantial evidence tending to support the amount of the jury's verdict.
6. The verdict is excessive and appears to have been given under the influence of passion and prejudice.

7. The Court erred in the charge to the jury and in giving instructions requested by plaintiffs and objected to by defendants and failing to give instruction requested by defendants, P. W. Siebrand and Hiko Siebrand, upon objection by plaintiffs.

8. The verdict was founded upon surmise, conjecture, speculation and inference.

9. The Court erred in rejecting evidence offered by these defendants and objected to by the plaintiffs.

10. The Court erred in the admission of evidence offered by the plaintiffs and objected to by these defendants.

11. Irregularities in the proceedings of the Court, jury and prevailing counsel, whereby these defendants were deprived of a fair trial.

12. The Court erred in refusing to grant defendants, P. W. Siebrand and Hiko Siebrand, a new trial.

13. The Court erred in refusing to grant the motion of P. W. Siebrand and Hiko Siebrand to strike a portion of the judgment.

14. The Court erred in refusing to grant defendant, Carroll, motion for satisfaction of judgment.

W. FRANCIS WILSON, and
KENT A. BLAKE,

By /s/ W. FRANCIS WILSON,
Attorneys for P. W. Siebrand
and Hiko Siebrand.

Receipt of copy acknowledged.

[Endorsed]: Filed August 6, 1954.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT ON APPEAL

The point upon which appellant, S. J. Carroll, will rely on appeal is:

1. The Court erred in refusing to grant Defendant Carroll's motion for satisfaction of judgment.

/s/ HOWARD W. GIBBONS,

GIBBONS, KINNEY &
TIPTON,

Attorneys for S. J. Carroll.

Receipt of copy acknowledged.

[Endorsed]: Filed August 9, 1954.

